REPORTS

OF

CASES ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF

THE STATE OF LOUISIANA.

WESTERN DISTRICT.

OPELOUSAS, SEPTEMBER, 1840.

LAMBERT *vs.* FRANCHEBOIS ET AL.*

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, FOR THE PARISH OF ST. LANDRY, JUDGE BOYCE OF THE SIXTH DISTRICT PRESIDING.

The paraphernal property of married women is not bound for the debts contracted by the husband while at the head of the community: neither are the fruits liable, when the wife administers her own property.

A sale by the husband to the wife, when made for replacing her dotal and paraphernal property or effects, is valid in law, particularly when no fraud and collusion is alleged.

A sale from husband to the wife, for replacing her dotal and paraphernal effects, should not be attacked, unless on the ground of fraud and collusion.

This is an injunction to stay a seizure under execution. The sheriff seized under execution, which issued on a

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* Judge GARLAND did not sit in the first sixteen cases in the Western District, at Opelousas. He was sworn in and took his seat on the 23d September, 1840. On that day, Judge SIMON withdrew for the remainder of the term at Opelousas, having been counsel in all the other causes which were tried. Judge BULLARD did not get to Opelousas this term, being detained in travelling; but went on to Alexandria, and met the court there.

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judgment obtained by David Simmons against Pierre Joubert, husband of the plaintiff, and one J. N. Franchebois, his surety, seven bales of cotton and a horse, which the plaintiff alleges is her separate, paraphernal property, and was pointed out to the sheriff by Franchebois, who was one of the defendants in the execution.

The plaintiff alleges that the property seized is paraphernal, of which she had the administration, and is not liable for her husband's debts. She prays that the sale be enjoined, and that she have judgment for damages against Franchebois, for his malicious conduct in this case.

The defendant pleaded the general issue, and prayed that the injunction be dissolved, with damages.

The evidence fully showed that the property seized, especially the cotton, was raised by the plaintiff's own slaves on her land; and that she had, by notarial act between her and her husband, resumed the administration of her own separate property, which she had inherited from her parents.

There was judgment perpetuating the injunction, and decreeing the property under seizure to belong to the plaintiff. The defendant appealed.

T. H. and *W. B. Lewis*, for the plaintiff, contended, that the judgment should be confirmed. The facts of the case show that the plaintiff ought to recover. She shows in support of her claim an act passed between herself and husband, the 23d July, 1838, by which the property brought by her into marriage is set off to her; and other property sold and delivered to her by her husband, in payment of the portion of her inheritance, which he had received in cash. She had the control and sole administration of all her own property.

2. She exhibits papers from the probate office, to show what her paraphernal property was, and also the testimony of witnesses. Upon this evidence we will raise but one question of law, which is, that the act from Joubert, the plaintiff's husband, settles and fixes her rights, and gives a good and valid title to the land, slaves and other property claimed by her, so far as it was not her's by inheritance. *Louisiana Code* 2420 and 2421.

Splane and *Linton*, for the defendant, insisted that the seizure in this case was properly made, and the judgment of the District Court should be reversed.

2. Because the debt which was sought to be collected against Joubert, was a community debt, and all the property of both husband and wife, so long as the same remained in community, was bound for its payment.

N. B. This debt was created before the contract between husband and wife.

3. The husband cannot transfer to the wife his own property, or that of the community, for the purpose of replacing her dotal or other effects, by a contract before a notary, before the amount of her claim is established by a court of competent jurisdiction, contradictorily with the creditors.

4. If the paraphernal property be administered by the wife, or set aside to her by contract, the revenues arising from such property must be applied to the payment of the marriage charges, community, &c., and may be seized and sold to satisfy a community debt. *Louisiana Code*, 2362, *et seq.*; *Idem.*, 2409, and authorities there referred to.

Lewis, in reply:

1. If the wife who administers her paraphernal property be bound to contribute to support the marriage charges, this may give an action to creditors to compel such contribution, but does not authorize a seizure of the fruits of her paraphernal property to pay a debt of the husband. *Louisiana Code*, *article* 2366.

2. There is no evidence showing the debt, on which the judgment was rendered against Joubert, was contracted for marriage charges, and if there were, such debt cannot be collected by seizure of the wife's property, without first obtaining judgment against her.

3. The community consists only of the fruits of the effects *administered by the husband*, &c., and not of the fruits of paraphernal property *administered by the wife*; *Louisiana Code*, 2371: which last are not liable to be seized to satisfy the debts of the husband.

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4. The sale of July 23, 1838, is valid in law; was made for a legal consideration, as is proved in the record, and is not even alleged to be fraudulent. *Louisiana Code*, 2421.

Simon J., delivered the opinion of the court.

Plaintiff states, in her petition, that an execution having issued against her husband at the suit of one David Simmons, the sheriff seized seven bales of cotton and a horse, which she claims as her property. She further alleges, that said cotton was made on her land by the labor of her slaves, and was ginned at her own expense; that the land and slaves are her paraphernal property, whereof she has the legal administration. She prays for injunction and for damages, and that said injunction be made perpetual. Defendants plead the general issue, and that the injunction may be dissolved. The district judge rendered judgment perpetuating the injunction, and one of the defendants appealed.

The evidence shows that the judgment, by virtue of which the execution issued, was rendered on the first of December, 1838; that on the 23d of July preceding, the plaintiff, by a notarial act, resumed the administration of her paraphernal estate, which consisted in a plantation, slaves, horses, cattle &c., and a certain sum of money; all which she had inherited from the estates of her parents. All the acts relative to the estate of her father are produced. The same authentic act contains also a sale or transfer of certain property from the husband to the wife, in payment, and as the replacing of the amount which he had received in her right from the estate of her father. It is further shown, that the cotton seized was made on her land, and raised by her slaves; and that the horse is her property.

It is contended by the appellant: 1. That the debt, being a community one, created before the contract between husband and wife, all the property of both is bound for its payment.

2. That the husband cannot transfer his own property to his wife, or that of the community, for the purpose of replacing her dotal or other effects, before the amount of her

claims is established contradictorily with the creditors: And

3d. That if the paraphernal property is administered by the wife, the revenues arising therefrom must be applied to the payment of the marriage charges.

The paraphernal property of married women is not bound for the debts contracted by the husband while at the head of the community; neither are the fruits liable when the wife administers her own property.

A sale by the husband to the wife, when made for replacing her dotal and paraphernal property or effects, is valid in law, particularly when no fraud and collusion is alleged.

A sale from husband to the wife for replacing her dotal and paraphernal effects, should not be attacked unless on the ground of fraud and collusion.

I. It is perfectly clear, that the paraphernal property of a married woman is not bound for the debts contracted by the husband; and, that the fruits, proceeding from such property, do not belong to the community, unless the wife permits the husband to administer it. *Louisiana Code, articles* 2363 *and* 2371.

II. It is necessary to remark, that the defendant's answer contains no allegation of fraud, or collusion between the parties to the act. The law authorizes the wife to withdraw from her husband the administration of her paraphernal estate, whenever she thinks proper to do so; *Louisiana Code, article* 2364: and it cannot be doubted, that a sale or transfer of property, made by a husband to his wife, is valid in law when it has been made for the replacing of her dotal or other effects, particularly when no fraud and collusion is urged against it: *Louisiana Code, article* 2421. In this case, there is satisfactory proof that the sale in question was made for a legal and valuable consideration, and we cannot see any reason why the husband's creditors should be permitted to attack it, unless it be on the ground of fraud and collusion.

III. The defendant has not shown that the debt, to satisfy which the seizure complained of had been made, was contracted for marriage charges; and, had such evidence been adduced, we are not ready to say that it could have authorized a seizure of the fruits of the plaintiff's paraphernal property. This circumstance might entitle the creditors to an action to compel a contribution on the part of the wife, and then only after judgment obtained against her, could her property be seized to satisfy such debt.

We are of opinion that the district judge did not err in perpetuating the injunction.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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WILCOXON
vs.
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WILCOXON *vs.* ROGERS ET UX.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, FOR THE PARISH OF ST. MARY, THE JUDGE OF THE SEVENTH PRESIDING.

Titles to land must be located according to their calls; and, where part of the place called for by the title, is abandoned, and another person locates it and acquires a better title, the party abandoning cannot make his location in another place to the prejudice of others. He must suffer the loss.

Where two confirmations of land titles are of equal dignity, and one is regularly located and accompanied by possession, and no steps taken by the other, the first will hold the land by the prescription of ten years.

A corporeal possession in the beginning, a civil one will be sufficient to complete the possession already begun, and to support the prescription of ten years.

This is a petitory action. The plaintiff alleges, he is owner and possessor of one thousand arpents of land situated at the confluence of the rivers Teche and Atchafalaya, having twenty-five arpents front on the Teche. He derives title from the heirs and legal representatives of Henry and John Bosler, deceased. He further alleges, that Matthew Rogers and wife have taken illegal and forcible possession of a part of said land, and have committed waste thereon to his damage one thousand dollars. He prays judgment dispossessing the defendants of his land and for his damages. The defendants denied generally the allegations, and averred that they were the lawful owners of land on the east side of the Teche, having a front of seven arpents with the depth of forty; the title to which they derived from Levi Foster, who held under one Wm. Biggs. That Foster sold to the former husband of one of the defendants (Sojourner,) with warranty, and has since died, leaving a widow who is administratrix of his estate, and whom they call in warranty. They plead prescription of thirty, twenty, and ten years; and pray to be quieted in their title and possession to said land.

The widow Foster set up title under Biggs, from whom her husband purchased the 5th November, 1816. She calls the heirs of Biggs in warranty. Biggs's heirs denied the right of the plaintiff, or widow Foster, to recover. They aver their ancestor had a good title to six hundred and forty acres of land on the east side of the Teche, the title to which was confirmed by Congress the 29th April, 1816. They admit their ancestor sold to Levi Foster the tract of land specified; that he acquired it by a valid title; and that the plaintiffs have no title. They deny that this is the same land sold by Foster to Sojourner; and also deny that they are responsible to Foster's widow in warranty; and plead prescription of ten and twenty years.

On the trial, the plaintiff exhibited title to a tract of twenty-five arpents front of land on the east side of the Teche, at *or near* its junction with the Atchafalaya, which was granted by virtue of a *requête* to John and Henry Bosler, dated 7th December, 1801, on a certificate of vacancy by the commandant. This title was confirmed by the government of the United States the 29th April, 1816.

The defendant showed title under Biggs, who had possession and resided on the land. The main contest arises out of the manner of locating these claims.

The plaintiff contends, that his land cannot be located at the confluence of the two rivers, according to the calls of the title, because an older claim of one Jacques Deronen covers that part, or about one hundred and twenty acres, and pushes his land higher up the Teche, and that Bosler's title is superior to Biggs's; and he further insists, that he has a right to push up the latter and take his quantity from the defendants who reside on it.

Biggs's heirs showed title, confirmed by the government, in proof of possession, founded on settlement, occupancy and cultivation, from 1801 and '2 up to the present time.

The district judge was of opinion, after an attentive examination of all the evidence and titles, that the defendants had the best title, and were entitled to the land they claimed.

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There was judgment in their favor, and the plaintiff appealed.

T. H. Lewis, for the appellant.

Splane, contra.

Simon, J., delivered the opinion of the court.

Plaintiff sets up title to a tract of land situated at or near the confluence of the rivers Teche and Atchafalaya, containing twenty-five arpents front on the river Teche, or about one thousand superficial arpents, which title is derived from the heirs and representatives of John and Henry Bosler. He alleges, that the defendants have taken possession of a part of his land, and prays that they be ordered to remove from said land. He also prays for one thousand dollars damages.

Defendants called in their warrantors, who all filed their answers, in which they allege that William Biggs, under whom they hold, had good and valid titles to six hundred and forty acres of land on the east side of the bayou Teche, acquired from the government of the United States by settlement, and regularly confirmed and located. They also plead the prescriptions of ten and twenty years. The inferior court quieted the defendants in their title to and possession of their tract; from which judgment, plaintiff appealed.

The titles of the plaintiff are predicated upon a *requête* and certificate of vacancy signed by the Spanish commandant, dated 7th December, 1801, in which the Boslers demand a concession of twenty-five arpents in front, by the ordinary depth of forty, situated at the mouth of the river Teche, on the east side. A part of this tract (six hundred and forty acres,) was confirmed in their favor on the 5th of September, 1811; and the balance of two hundred and six acres, was confirmed to them by act of Congress of the 29th April, 1816. The first confirmation was located, by a regularly approved plat, on the 28th of November, 1813, the upper

line of which calls for the defendants' tract; and the second confirmation never was located.

Defendants' claim is founded on a permission to settle, given to Biggs by the commandant of Attakapas in 1801, and upon Biggs's settlement in 1802, with proof of possession and occupancy, by virtue of which he was confirmed in his tract to the extent of six hundred and forty acres, by act of congress of the 29th of April, 1816. This confirmation was located by a plat of survey made on the 24th February, 1819, and approved on the 5th of October, 1824. The lower line of this plat calls for Bosler's.

From the parole evidence, it appears that Bosler's settlement was originally on a mound at the point of confluence of the two rivers, where they had a house; and that Biggs's settlement was about a mile from said point. Biggs occupied and cultivated a part of the land for a number of years, and was living upon it when he exchanged with Foster, (5th of November, 1816.) Sojourner purchased of Foster in 1828, and continued to possess and cultivate the land. There is proof of payment of taxes by Biggs, Foster, and Sojourner; and the surveyor, appointed by the court, shows the old marks and boundary posts which he found on the tracts to correspond with the approved surveys.

From the returns of the surveyor, it appears that the point at the confluence of the two rivers, to the extent of one hundred and twenty acres, is claimed by one Jacob Deronen, by virtue of a Spanish title regularly confirmed; that this quantity is not included in the survey made for the plaintiff in 1813; and the plaintiff contends that he has a right to make up that deficiency by carrying his line further up, and taking the same quantity out of defendant's tract. He also maintains, that as his second confirmation, for two hundred and six acres, grows out and is a part of the tract which he originally owned, that he is entitled to locate it above the upper line of his first confirmation, so as to make it an entire body of land between the upper line of Deronen's tract and the removed lower line of the defendants.

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When the plaintiff located his first confirmation, he thought proper to abandon the very spot of his vendor's original settlement at the mouth of the river, which place his title calls for, and to carry his lower line further up. This was certainly irregular, and the circumstance of his titles conflicting with Deronen, cannot turn to the prejudice of the defendants. It is a well settled rule, that titles must be located according to their calls; and it is clear, that if Deronen had a better title than plaintiff to the one hundred and twenty acre tract, plaintiff was to suffer the loss, since his title calls for the very place where Deronen located his. This plaintiff knew at the time he made his survey, as he then extended his lines so as to include the balance of his tract, under the first confirmation, between the upper line of Deronen's and the lower line of the defendants', after abandoning the one hundred and twenty acres conflicting with Deronen. This part of the plaintiff's claim must therefore be rejected.

Titles to land must be located according to their calls; and where part of the place called for by the title is abandoned, and another person locates it, and acquires a better title, the party abandoning cannot make his location in another place, to the prejudice of others. He must suffer the loss.

The next question is with regard to the second confirmation, which plaintiff seeks to locate on defendants' tract. Both confirmations were obtained by the same act of congress, and are, therefore, of equal dignity; but the defendants caused their title to be regularly located, and no attempt has been made to show that plaintiff ever took any step to locate his. Defendants were in the actual and corporeal possession of the land, in good faith, at the time their confirmation issued, and the subsequent location afforded them the means of ascertaining the metes and bounds of the tract which they were then possessing by virtue of a just title, by them definitively acquired in 1816. Although Foster did not, perhaps, continue to have the corporeal possession of the land after his purchase, he possessed it civilly, *animo domini*, and by virtue of a title sufficient to transfer the property. Sojourner purchased in 1828, took immediate possession of the tract, put it in cultivation; and as it is perfectly clear, and cannot be controverted, that the actual possessor, who proves that he or his authors have formerly been in possession, is to be presumed to have been in possession in the intermediate time; *Louisiana Code*,

Where two confirmations of land titles are of equal dignity, and one is regularly located and accompanied by possession, and no steps taken by the other, the first will hold the land by the prescription of ten years.

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A corporeal possession in the beginning, a civil one will be sufficient to complete the possession already begun, and to support the prescription of ten years.

article 3458: that when a person has once acquired possession of a thing by the corporeal detention of it, the intention of possessing suffices to preserve the possession in him, although he may have ceased to have the thing in actual custody; *Idem.*, 3405: and that, to plead the prescription of ten years, it is only necessary to show a corporeal possession in the beginning, a civil one being sufficient to complete the possession already begun. *Idem.*, *article* 3453. We are of opinion that the defendants, having satisfactorily established that they have possessed the tract of land confirmed in their favor, in good faith, by virtue of a just and legal title, during more than ten years previous to the institution of this suit, (*Idem.*, *articles* 2445, 6, 7, 8, 9, *and others*,) have acquired such title, by prescription, as ought to be considered sufficient to defeat the plaintiff's pretensions.

For these reasons, we come to the conclusion that the judge *a quo* did not err in giving judgment in favor of the defendants.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF ST. MARTIN.

The mere fact of a person's dying in another parish, is not conclusive that his succession ought to be opened and administered there, or that it ought not to be administered in another parish where from an inventory the deceased left property.

When a succession has already been opened and partially administered in a parish where the deceased left property, the former proceedings will be considered as *prima facie* evidence of the facts necessary to base the jurisdiction on an application to continue and complete the administration in the same place.

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This case comes up in the form of an opposition to the defendant's application to be appointed administrator of the estate of Jean Pierre Descuirs, deceased.

The defendant, David F. Sandoz, presented his petition to the judge of probates of the parish of St. Martin; showing that there was property belonging to Descuirs' estate, not administered in said parish; that it was the desire of the heirs and creditors that it be administered, and he prayed to be appointed administrator.

The application was published according to law.

Gary, the plaintiff in opposition, presented his petition, objecting to the appointment of the defendant or any other person, as administrator; alleging that Descuirs' succession was not vacant; that he died in New-Orleans, the place of his domicil, and left no property in this parish; and that his succession is not opened here.

The evidence showed Descuirs' succession had been administered in part by F. Beauvais, in the parish of St. Martin, who had been qualified as administrator, and taken an inventory, but died before he completed his administration. The present application is made that it may be completed. The whole proceedings in appointing Beauvais, and the inventory, all had in the parish of St. Martin, were produced in evidence.

The probate judge was, however, of opinion he was without jurisdiction and dismissed the application. The defendant appealed.

Morse, for the plaintiff, insisted that the defendant failed to establish a right to open the succession of Descuirs, in St. Martin, when it was admitted he died in New-Orleans, the place of his domicil. *Code of Practice, article* 928.

2. It is not shown that there is any property of the deceased in St. Martin, on which to administer; at least, any existing there at the time of this application.

Voorhies, for the defendant, contended that the plaintiff had no right to interfere in this matter; not being a creditor.

That the succession of Jean Pierre Descuirs had been opened and partially administered in the parish of St. Martin, by François Beauvais, who had died, and it was necessary to complete the administration.

Simon J., delivered the opinion of the court.

The only question submitted to our consideration in this case is, whether the judge of probates of the parish of St. Martin, decided correctly in refusing to entertain jurisdiction of the application made by the appellant, to be appointed administrator to the estate of J. P. Descuirs, deceased, and in rejecting said application.

The record presents the following facts: Descuirs died in New-Orleans; the period of his death is not shown. In October 1831, his beneficiary heirs presented a petition to the Court of Probates of the parish of St. Martin, alleging that his succession was opened in said parish, and praying that an inventory of the property of the estate be made, and that an administrator be appointed. The judge *a quo, then* entertained jurisdiction; the inventory was ordered and made accordingly, and on a further application made by Beauvais, one of the heirs, he was appointed administrator to the succession of Descuirs, stated in the order to be "late of the parish aforesaid, deceased;" Beauvais took his oath and gave his bond as administrator, and proceeded as such to administer on the estate. Some time afterwards, Beauvais died, and the estate of Descuirs remained unadministered and unliquidated for a number of years, when in February 1840, the appellant, Sandoz, presented a petition to the court *a quâ*, alleging that Descuirs' estate had been opened for some time in said parish, that the property inventoried had never been disposed of, that the debts had never been discharged, and prayed to be appointed administrator. Before the expiration of the ten days, a third person who shows no interest in the estate, made opposition to Sandoz's application, suggesting to the court that the deceased had his principal domicil in New-Orleans, where he died, and that he had left no property in the parish of St. Martin. The judge of probates,

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The mere fact of a person's dying in another parish, is not conclusive that his succession ought to be opened and administered there, or that it ought not to be administered in another parish, where, from an inventory, the deceased left property.

Where a succession has already been opened and partially administered in a parish where the deceased left property, the former proceedings will be considered as *prima facie* evidence of the facts necessary to base the jurisdiction on an application to continue and complete the administration in the same place.

without any proof but an admission found in the record, that Descuirs had died in New-Orleans, was of opinion that he could not entertain jurisdiction of the application, and rejected it. From this judgment the applicant appealed.

The mere fact of Descuirs' death in New-Orleans, is not, in our opinion, sufficient to authorize us to conclude that his estate ought to be opened there, or that it ought not to be opened in the parish of St. Martin, where, from the inventory, it is shown he left property. It is true, that if a deceased person had no fixed residence in the state, his estate should be opened in the parish in which he died, unless, if he have effects in different parishes, his principal property be in another parish. *Louisiana Code*, 929; *Code of Practice*, *article* 929. But it is equally true, that although Descuirs died in New-Orleans, he may have had his domicil in St. Martin, or he may have owned no property in any other parish. Perhaps, if this were the first application for the administration of Descuirs' estate, it would have been incumbent on the appellant to show such facts as are legally necessary to authorize the judge *a quo* to entertain jurisdiction; but when we have before us the proof that the estate had already been opened in St. Martin, that legal proceedings had been had in relation thereto, and that an administrator had been appointed and qualified there, we may fairly presume that the judge of probates did not take jurisdiction without being satisfied that he had a right to do so. We are disposed to consider the former proceedings as *prima facie* evidence of the facts on which the right of jurisdiction is based; and as, in our opinion, the present application is but a continuation of the first proceedings, it would require very strong proof on the part of any opponent, to destroy their legal effect, and to treat them as nullities.

Under this view of the question, we think the judge *a quo* erred in refusing to maintain his jurisdiction, and in dismissing the appellant's application.

It is, therefore, ordered, adjudged and decreed, that the judgment appealed from be annulled, avoided and reversed;

that the plea to the jurisdiction be overruled; that the judge of the Court of Probates proceed to take cognizance of the appellant's petition, and that this case be remanded for further proceedings, the appellee paying costs in this court.

TAYLOR *vs.* ANDRUS.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, FOR THE PARISH OF ST. LANDRY, THE JUDGE OF THE SIXTH PRESIDING.

Contracts of hiring, must be construed and modified by the usages, customs, and general understanding of parties in the country where they are made; as a slave, hired for an ostler in a country inn, may be used also to drive a wagon, to haul provisions and fuel for the tavern.

So, where a slave was hired as an ostler in a small town, and he was employed to drive a wagon and haul wood to the tavern, and was accidentally killed: *Held*, that the *owner cannot recover his value*, as having been improperly used or employed.

This is an action for the value of a slave which the plaintiff hired to the defendant, and who was killed whilst in the employ of the latter. The plaintiff alleges, that he hired, for one year, his slave Henry, of the value of fifteen hundred dollars, to the defendant, as an ostler in the town of Opelousas, a description of service in which he was well skilled, and which is free from danger; but that the defendant, disregarding his agreement, on the 11th of May, 1839, employed said slave to drive a wagon and team; that some of the horses were ungovernable, vicious and dangerous, known to be such to the defendant, and ran away with the wagon, threw the slave Henry to the ground with great violence, drawing the wagon over him, fracturing his leg, and inflicting wounds of which he soon after died. That the defendant, by reason of his having diverted said slave

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from his employment as *an ostler*, and employed him in a dangerous service, not intended by the contract of hire, and out of his proper business as an ostler, has rendered himself liable for his loss and to pay his value; for which he prays judgment.

The defendant pleaded a general denial.

The evidence clearly showed, that the defendant had employed the boy Henry to drive a wagon and team in hauling wood to his hotel in the town of Opelousas. That, on going out of town for the third load, in descending to a bridge over a small bayou, some of the horses took fright and began running. The boy was thrown off, and the wagon run over him, broke and fractured his leg, bruised and hurt him so that he soon after died. The occurrence is shown to have been purely accidental. It appears, however, in evidence, that the defendant acknowledged to the plaintiff's attorney that he had hired the boy Henry as an ostler, and when he was about using him, on a former occasion, to drive a hack, he asked the consent of Dr. Taylor, the owner; but that, in the present case, he had not done so.

It further appeared, the defendant had a very vicious horse, which he said was so bad he could do nothing with him. One witness (bar-keeper,) declared that when the boy started, he heard the defendant forbid the boy Henry from putting the vicious horse in the wagon. The boy was then on the leading horse, and ready to drive out at the gate. The vicious horse was jumping, and the defendant ordered the boy never to take this horse again, and to take him out of the wagon, and went into the house. The boy, it seems, disobeyed, and kept the vicious horse in gear. He went to haul wood for the house, and one of the defendant's boys went with him and rode in the wagon, and, according to some accounts, was cracking a whip while going down a small descent to the bridge, which was the probable cause of the horses becoming affrighted and running away with the wagon.

On the whole evidence of the case, and after receiving a charge from the judge, the jury returned a verdict of seven hundred dollars for the plaintiff; and from judgment rendered thereon, the defendant appealed.

W. B. and *T. H. Lewis*, for the plaintiff, insisted on the affirmance of the judgment. They argued to show that the defendant was guilty of neglect in allowing the slave to be employed in driving a wagon, especially when it is shown that the defendant well knew one of the horses was vicious, unmanageable and dangerous. He illegally diverted the slave from the employment for which he was hired (that of an ostler,) to the more dangerous one of driving a wagon and team. The law of bailment was cited and relied on.

2. Where a slave is hired as an ostler, the law expressly forbids that he shall be otherwise employed; and, if any accident happens, the hirer is responsible for neglect and for not taking the proper care he was bound to do. *Story on Bailments, verbo Hiring*, 263, *section* 39; *Louisiana Code*, 2681–2.

Voorhies and *Swayze*, for the defendant.

1. The defendant ought not to be made responsible for the loss of the slave Henry, who was accidentally killed. He had no control over the act from which the accident resulted. On the contrary, it seems that he expressly forbade the slave Henry from driving the wagon; but, unfortunately, the order was disregarded.

2. The law exacts of the lessee but ordinary diligence, in the preservation of the property. The defendant, in this instance, exercised not only ordinary but extraordinary diligence; and it is clear, that he could not have prevented the accident had he used all the diligence which a prudent man would have done in the preservation of his own property. Hence, no liability results. *Story on Bailment, pages* 263–4 *and* 5; *Kent's Commentaries, vol.* 2, *p.* 456; *Jones on Bailments, p.* 26, 90.

3. Admitting that the defendant *permitted* the slave Henry to drive the wagon on this occasion, yet it was not beyond

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the sphere of an ostler at a country inn, whose services, it cannot be presumed, were to be exclusively confined to the care of the horses.

Morphy, J., delivered the opinion of the court.

This is a claim for the value of a slave alleged to have been hired to defendant as an ostler, and killed while employed by the defendant to drive a wagon, a service said to be different from that for which he had been hired. The case was laid before a jury, who brought in a verdict for the plaintiff. After an unsuccessful attempt to obtain a new trial, the defendant appealed.

The evidence shows that the defendant, who is a tavern-keeper, employed plaintiff's slave, together with one of his own, to haul wood in a wagon for the use of his house; that one of his horses being rather skittish and vicious, defendant (says one witness) cautioned the boy to be careful of him; another witness says that he had ordered him not to use this particular horse. After taking to defendant's house two or three loads, the horses ran away on their way back to the woods with the empty wagon; the plaintiff's slave fell from the horse he was riding, broke his leg, and died shortly after.

There is no testimony that the boy was hired as an ostler. The defendant admitted, after the accident, that he was in his employ as such; this admission alone would prove the use defendant made of the boy rather than any agreement on the subject with his master; but it is coupled with the circumstance that on a previous occasion, the defendant, before using the slave as a hack-driver, asked plaintiff's consent to do so. This conduct of defendant gives strong countenance to the averment in the petition, that the slave was hired expressly as an ostler. Admitting such to be the fact, it by no means follows that the hirer was not to exact from the slave any other kind of service whatever. An intelligent being like a slave, cannot be assimilated to a horse or an inanimate object, the particular uses of both, which are limited, and cannot be changed without materially impairing their value or utility. A race horse, for instance, would lose

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The contract of hiring must be construed and modified by the usages, customs and general understanding of parties in the country where they are made; as, a slave hired as an ostler in a country inn, may be used also to drive a wagon to haul provisions and fuel for the tavern.

all his value as such, were he to be put to the plough or to a dray. A slave, although hired as possessing a particular talent, is expected to render numberless other services, especially at a country inn, where there is seldom sufficient employment for his particular talent or trade. These other services or uses he may be put to, cannot in any way detract from his value, unless from their nature they be calculated to render him less fit for his principal occupation or talent; as for instance, if a seamstress, hired expressly as such, was for a long time used as a washerwoman or as a field hand. Contracts must necessarily be modified by the usages, custom and general understanding of each country in relation to them. Who, among us, would think himself precluded from using a slave, hired as a cook, to do a little work in a garden, or from sending him for a cart-load of wood for the use of the kitchen? In like manner, had the defendant sent the plaintiff's boy for a load of hay or fodder to feed his horses, his right to do so could hardly be questioned, and the accident might have happened on such an occasion as in the present instance. If two or three hours in the day were sufficient to do his work as an ostler, at defendant's tavern, was it contemplated by either of the contracting parties that the boy should remain idle the balance of the day? Certainly not. It then remains to inquire whether the service of driving a wagon be a dangerous one, calculated to lessen the value of plaintiff's slave as an ostler. Whether bound to ask permission or not, the defendant had obtained plaintiff's permission for his slave to drive a hack. It is difficult to believe that he would have withheld it for driving a wagon, an occupation which cannot be more dangerous. We incline to think it much less dangerous; for horses are more apt to run away with a hack than with a heavy wagon. The driving of a hack or wagon can hardly be considered as foreign to the business of an ostler. It certainly could not render the boy less fit for it. Upon the whole, we do not see in the conduct of the defendant, any fault or neglect that should make him liable for a loss that might be considered as purely accidental. The jury gave a verdict for seven hundred dollars, when the

So, where a slave was hired as an ostler in a small town, and he was employed to drive a wagon and haul wood, in which he was accidentally killed: *Held*, that the *owner cannot recover his value*, as having been improperly used or employed.

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value of the boy was proved to be fifteen hundred dollars; being no doubt at a loss to reconcile the law, as stated to them with their sense of natural justice, they split the difference. This we cannot do.

It is, therefore, ordered and decreed, that the judgment of the District Court be annulled, avoided and reversed; the verdict set aside, and that there be judgment for the defendant, with costs in both courts.

FOREMAN *vs.* WIKOFF.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, FOR THE PARISH OF ST. LANDRY, THE JUDGE OF THE SIXTH DISTRICT PRESIDING.

A notice to the endorser, deposited in the principal post-office of the parish, but not addressed to him at his domicil or usual place of residence, five miles from which there is another post-office, although in the same parish, *is insufficient.*

But, where it is shown that notice reached the endorser the second day after protest, who lived twenty miles from the place, by private conveyance of the notary, it is sufficient proof of diligence and notice to bind the endorser.

This is an action against the maker and endorser of a promissory note. It was signed by L. DeKerlegand, and made payable to the order of William Wikoff, who endorsed it in blank. The note was protested for non-payment at maturity, and the notary certifies that he gave notice, on the day of protest, to the endorser, by putting that for the defendant in the post-office in the town of Opelousas, addressed to him in the parish of St. Landry; and that he sent another notice to his residence in the parish, distant about twenty miles. The defendant pleaded a general denial, and want of regular demand and protest, and legal notice.

Upon these pleadings and issues, the cause was tried. The evidence showed, that the defendant resided twenty miles from the town of Opelousas, where the notice was deposited in post-office on the day of protest; and, that there is also another post-office within five miles of his residence, all in the same parish: but the defendant was in the habit of receiving his letters and papers in the Opelousas post-office. A witness and clerk of the notary, testified that he gave another notice for Wikoff, the *day after protest*, to Dr. Cook, to be delivered, who, in his presence, gave it that day to defendant's wife, in her carriage on her way home, for her husband. He admits, in answer to interrogatories, that he received it next day after it had been delivered to his wife.

Upon this evidence, there was judgment against the defendant, and he appealed.

T. H. and *W. B. Lewis*, for the plaintiff, insisted that the notice was regular, and sufficient to bind the endorser. They prayed the affirmance of the judgment.

Splane, for the defendant, insisted that the notice of protest was insufficient to bind the endorser. Where the party lives a short distance from a post-office, notice placed in it is insufficient. 3 *Martin, N. S.*, 35; 6 *Idem.*, 508; 12 *Louisiana Reports*, 182; 14 *Idem.*, 392; 5 *Idem.*, 265; 8 *Idem.*, 171.

2. Where an endorser resides in the country, the notice of protest put in the post-office must be addressed to him at his usual place of residence. 1 *Moreau's Digest*, 96.

Swayze, on same side, argued to show that this notice was insufficient. The law required that notice should be deposited in the post-office of the place of protest, if the endorser resides at a distance, directed to the *nearest* post-office to his residence. Here, it was directed to the defendant in the parish of St. Landry, and he lived twenty miles from the place of protest. There was another post-office, much

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nearer, and within five miles of his residence. Such notice is insufficient and irregular, and discharges the endorser. 5 *Martin, N. S.*, 139; 6 *Idem.*, 508; 5 *Louisiana Reports*, 263; 8 *Idem.*, 171.

2. The certificate of the notary states that, "he sent another notice *to the usual residence* of the said Wikoff, &c." This is too vague and indefinite, and does not, of itself, establish the fact that due notice was given to the endorser. 3 *Martin*, 35.

Simon, J., delivered the opinion of the court.

Defendant, Wikoff, is sued as endorser of a promissory note; he acknowledges his signature, but denies ever having received any legal notice of protest. Judgment was rendered against him, and he appealed.

The notary in his certificate states, that the endorsers (by names) have been notified of the protest by two notices, printed and written, signed by him, sealed and folded in the form of letters, dated on day of protest, and addressed to them respectively, parish of St. Landry, which he deposited in the letter-box of the post-office, in the town of Opelousas; and, moreover, that he sent the other notices to the usual residence of the endorsers, &c.; all this was done on the day of the protest.

It is in evidence that defendant lives twenty miles distant from Opelousas; that there is a post-office about five miles from his house; that he has been in the habit for many years of receiving his letters from the post-office at Opelousas, and that they are not forwarded nearer his residence. It is also shown by a witness, that the notary gave him a letter for defendant, which witness gave to Dr. Cook next day, to be delivered to said defendant, and that he saw Dr. Cook go up to the carriage to give it to Mrs. Wikoff, who was in said carriage. Dr. Cook says he handed it to defendant's wife, but does not remember if it was on the same day. Defendant acknowledged under oath that he had received the notice by the hands of his wife, the day after she received it.

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A notice to the endorser, deposited in the principal post office of the parish, but not addressed to him at his domicil or usual place of residence, five miles from which there is another post office, although in the same parish, *is insufficient.*

But, where it is shown that notice reached the endorser the second day after protest, who lived twenty miles from the place, by private conveyance of the notary, it is sufficient proof of diligence and notice to bind the endorser.

Had the notary limited the exercise of his duty to the notice which he deposited in the post-office at Opelousas, it is clear it would have been insufficient, as it was not addressed to the defendant at his domicil or usual place of residence, five miles from which there is another post-office. 1 *Louisiana Reports*, 392; 1 *Moreau's Digest*, 96. Although it is in evidence that he has been for many years in the habit of receiving his letters at Opelousas, and that they are not forwarded nearer his residence, it is not shown that he ever gave the postmaster any instructions to that effect.

But, on the other hand, we think there is proof of sufficient diligence, from the fact that the other notice reached defendant the second day after that of the protest. The notary gave it to the witness on the same day he made the protest; witness handed it the next day, through Dr. Cook, to Mrs. Wikoff, who delivered it to her husband the day after. At a distance of twenty miles, it can hardly be expected that the notice could have reached the defendant sooner, even by mail. We think, therefore, that the district judge did not err in rendering judgment against him.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

BRENT, AGENT, &c. *vs.* CHEEVERS.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, FOR THE PARISH OF ST. MARTIN, THE JUDGE OF THE SEVENTH PRESIDING.

A judgment of the Probate Court, unappealed from, appointing the plaintiff agent, with power to collect the debts of a partnership firm, is full authority for him to sue and recover all accounts and debts due the firm.

The authority of a judgment of court, cannot be inquired into collaterally.

This is an action for the amount of certain sales of merchandize to the defendant, by order of Court of Probates.

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The plaintiff alleges, that he is the agent and administrator of the late commercial firm of M'Laughlin & Co., of the parish of St. Martin, and that the defendant is indebted to said firm in the sum of four hundred and forty-two dollars and eighty-eight cents, for goods and merchandize sold and delivered to him; and for which he prays judgment.

The defendant excepted to answering the petition, on the ground that Brent, who sues as agent, does not show any authority or power to sue as such, and has not filed any act or power of attorney by which he was created agent; and that he is not agent or administrator of said estate or firm. He prays that the suit be dismissed.

The plaintiff produced a judgment of the Probate Court ordering a sale of the property belonging to the late firm of M'Laughlin & Co., and appointing him the agent to collect all the debts, with power to liquidate all the concerns of said firm. This order and judgment was rendered on the petition of the curator of Hugh M'Laughlin, deceased, late one of the firm.

The district judge gave judgment for the defendant, sustaining the exceptions and dismissing the suit. The plaintiff appealed.

Morse, for the plaintiff, insisted on the reversal of the judgment.

1. He contended that the court erred grossly in dismissing the suit, because the agency of the plaintiff is established by a judgment of the Court of Probates, in a suit to which the defendant was a party, and which is unappealed from or set aside, for any of the causes mentioned in the 556th article of the Code of Practice.

2. The account on which the suit was brought, is for goods purchased at a sale made by order of the Court of Probates, and the District Court has no right to examine into their judgment collaterally, but only on appeal, when the case is within their jurisdiction.

Splane, for the defendant, urged that this action could not be maintained.

1. Because the judge of the Court of Probates had no power, in the suit of the curator of the succession of a deceased partner against the surviving partners, to appoint an agent to represent the surviving partners and the succession of the deceased.

2. Defendant is one of the surviving partners of the firm of M'Laughlin & Co., and could not be sued until the partnership affairs were finally settled.

3. The plaintiff had no power to sue as administrator or agent, not having been legally appointed to act in either of those capacities.

Simon, J., delivered the opinion of the court.

Plaintiff sues as agent of a late commercial firm, whereof defendant was formerly a member, and seeks to recover the amount of sundry goods and wares purchased by defendant, at the sale of the property of the firm; which sale, in consequence of the death of one of the partners, had been ordered by the Court of Probates. Defendant specially denied the plaintiff's alleged agency, and objected answering to the merits. The district judge sustained the exceptions, dismissed the suit, and gave judgment against plaintiff for costs, from which judgment this appeal has been taken.

We are at a loss to conceive how the judge *a quo* could come to the conclusion that plaintiff's agency was not sufficiently established. In support of his alleged right to sue, they produced in evidence a copy of a judgment of the Court of Probates, rendered contradictorily between the curator of the deceased partner's estate and the other members of the firm, which judgment, after ordering the sale of the property of the partnership, and fixing the terms thereof, decrees further, *at the request and by consent of parties*, that the plaintiff in this suit "be appointed agent to collect all the debts and to have all necessary power and authority to liquidate the concerns of the firm." This judgment stands unappealed from; the time for appealing had expired before the institution of this suit, and there is no pretense that it has ever been set aside in any of the modes pointed out by law. This

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court has repeatedly held that such judgment cannot be inquired into collaterally, and we are of opinion that the plaintiff has sufficiently proven his right to sue, as agent, and that the district judge erred in not overruling the defendant's exceptions.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court, be annulled, avoided and reversed; that the defendant's exceptions be overruled, and that this case be remanded for further proceedings, the defendant and appellee paying costs in this court.

HARMAN *vs.* M'LELAND.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, FOR THE PARISH OF ST. LANDRY, THE JUDGE OF THE SIXTH PRESIDING.

An action for a divorce, based on abandonment of the husband, cannot be maintained, until a decree of separation of bed and board be rendered two years previous to the application for a divorce, with proof of abandonment for five years.

The admission or confession of the husband, that he lives with another woman, in a foreign country, is insufficient evidence to authorize a divorce and to dissolve for ever the bonds of matrimony.

The mere acknowledgment of the truth of the facts alleged, made by either of the parties, even in an authentic act, can never be deemed sufficient foundation for a decree of separation from bed and board; *a fortiori*, of a divorce.

This is an action of divorce. The plaintiff, Lydia Harman, alleges, that in 1828, she was lawfully married to the defendant, James W. M'Leland, and that they lived together until 1830, when some time in that year her husband left her and now resides in Texas, where he has intermarried with another woman. She prays for a divorce dissolving the marriage.

There was a curator *ad hoc* appointed to represent the defendant, who pleaded the general issue.

The evidence showed that the parties had not lived together since 1832, and that the defendant resided in Texas, and had been absent from his wife four or five years. A letter of defendant, written from Texas to one of his brothers, in September, 1838, states, that he has a wife in that country, but will not bring her to see his relations, "as her company might not be agreeable to them all."

The judge presiding was of opinion the evidence was insufficient to authorize a divorce, gave judgment dismissing the suit. After an unsuccessful attempt to obtain a new trial, the plaintiff appealed.

Linton and *Garrett*, for the plaintiff.

Morse, contra.

Simon J., delivered the opinion of the court.

This is a suit for a divorce. The petition only states that defendant, without any cause, has deserted the petitioner, and resides in Texas, where he has intermarried with another woman. A curator *ad hoc* was appointed to represent the absent defendant; issue was joined, and after hearing the evidence, the district judge dismissed the action. From this judgment, plaintiff appealed.

The evidence shows that the defendant has been absent for four or five years in Texas, and that he has not lived with his wife since 1832. Plaintiff produced also a letter of the defendant to his brother, in which he mentions his having a wife in Texas, and in which he says that he will come and spend the summer with his mother, but that he will not bring *his wife* with him, as her company would not be agreeable, &c. &c.

An action for a divorce, based on abandonment of the husband, cannot be maintained, until a decree of separation of bed and board be rendered two years previous to the application for a divorce, with proof of abandonment for five years.

If this action is based on abandonment on the part of the husband, it cannot be maintained. The law requires certain formalities, which must be fulfilled, a decree of separation of bed and board, to be rendered two years previous to the application for a divorce, and the proof of abandonment for the space of five years. *Moreau's Digest, vol.* 1, *page* 412.

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The admission or confession of the husband that he lives with another woman in a foreign country, is insufficient evidence to authorize a divorce and to dissolve forever the bonds of matrimony.

The mere acknowledgement of the truth of the facts alleged made by either of the parties, even in an authentic act can never be deemed sufficient foundation for a decree of separation from bed and board; *a fortiori* of a divorce.

If this demand is founded on adultery, we think the evidence is not sufficient to support it; as, even admitting that a charge of adultery in a foreign country, could be made the basis of an action for a divorce in this state, the only proof thereof results from a letter of the defendant, which is used here as an admission of the fact. In such serious matters, the law requires more than the simple confession of one of the parties to dissolve forever the bonds of matrimony between them; facts must be shown, and such facts as will authorize a court of justice to declare that the interference of the law is absolutely necessary. The judgment must be rendered "*en grande connaissance de cause*," as Pothier says; and the mere acknowledgment of the truth of the facts alleged, made by either of the parties, even in an authentic act, can never be deemed sufficient to be the foundation of a decree of separation of bed and board, and *a fortiori* of a divorce. *Pothier, Contrat de Marriage, vol.* 2, Nos. 517 and 518. Were it otherwise, it would be easy and perhaps sometimes convenient for married persons to become separated or divorced by mutual consent, and such doctrine would be very mischievous in its consequences. The judge *a quo* did not err in rejecting the plaintiff's demand.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

ARDEN *vs.* SOILEAU.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, FOR THE PARISH OF ST. LANDRY, THE JUDGE OF THE SIXTH PRESIDING.

An agent may possess for his principal, and his possession is sufficient to maintain the possessory action.

This is a possessory action. The plaintiff alleges that he is owner, has the lawful possession and right of actual pos-

session, of a certain improvement on the public land which he had purchased, and had placed one Coe thereon to occupy said improvement. That Coe resided on it until a few days before suit, and left it. That he went to reside there himself, but found the defendant in possession, who refuses to leave the premises, and claims the right of possession. He prays to be put in peaceable possession, and allowed damages for the illegal acts of defendant.

The defendant pleaded a general denial, and denied specially that the plaintiff ever had possession or was dispossessed within the year previous to suit.

The plaintiff proved he had bought the improvement and placed Coe on the place to keep possession; that, when he heard Coe had left it, witness went to take possession for plaintiff, and found defendant in possession, saying he bought it from Coe.

There was judgment for the plaintiff, and defendant appealed.

T. H. and *W. B. Lewis*, for the plaintiff.

Morse, for defendant.

Simon, J., delivered the opinion of the court.

This case presents no question of any importance. The facts of possession, necessary to maintain this action, have been clearly and satisfactorily proven; and it cannot be doubted, that an agent may possess for his principal, particularly when, as in this case, he has been specially appointed for that purpose; *qui facit per alium, facit per se.*

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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APPEAL FROM THE COURT OF THE FIFTH DISTRICT, FOR THE PARISH OF ST. MARTIN, THE JUDGE OF THE SEVENTH PRESIDING.

The surviving partner cannot sue for a partnership debt, when he has not joined the representatives of the deceased partner, or has shown no authority as liquidator of the partnership affairs.

This is an action instituted by F. Connelly, who sues as surviving partner of the commercial firm of P. Connelly & Son, consisting of his father and himself, and lately trading under that style in New-Orleans. The suit is instituted on two promissory notes, signed by the defendant and made payable to said *firm*.

The defendant pleaded a general denial, and averred that the firm of P. Connelly & Son had failed, made a cession of their property, and that a syndic was appointed, who alone was authorized to collect the debts of the firm.

This suit had been at issue nearly two years, and when called for trial, the defendant prayed a continuance, to afford him time to obtain the papers and proceedings, relating to the insolvency of the plaintiff's firm, from New-Orleans, which his former counsel informed him were in his possession, but having removed from the district, he had not time to procure them in season for the trial. It appeared that at a former term, a continuance had been granted.

The district judge overruled the application for a continuance, and on the face of the pleadings, gave judgment for the plaintiff, and the defendant appealed.

Morse, for the plaintiff, insisted on the affirmance of the judgment. The continuance was properly refused; ample time was given, and a continuance already granted to procure the testimony and papers required. The defendant was guilty of *laches*, and judgment was properly given against him.

Splane, contra, urged the impropriety in refusing a continuance. The first attorney employed had possession of all the papers and had removed from the district; and the last one had not been put in possession of the testimony necessary to try the case. The case was tried without testimony.

Martin, J., delivered the opinion of the court.

The plaintiff sues, as surviving partner, on two promissory notes given by the defendant to the firm. The latter pleaded the general issue, and that the plaintiff cannot maintain the action because the firm had made a *cessio bonorum*.

The plaintiff had judgment and the defendant appealed.

There is a bill of exception taken to the opinion of the court, refusing a continuance to the defendant. The conclusion to which we have come, has rendered our attention to this bill of exception unnecessary.

It appears to us that the action is not maintainable. In the case of *Crosier* vs. *Hodge*, 3 *Louisiana Reports*, 353, this court held that "a partner, *as such*, has no right to sue for, or receive the debts *due the firm*, after the death of a co-partner." It was also held in the case of *Cutler* vs. *Cochran*, 13 *Louisiana Reports*, 484, that "on a dissolution of the firm by the death of a partner, the surviving partner cannot sue, without joining the representatives of the deceased." The plaintiff in this case has not brought his suit in such a form as to entitle him to recover.

The surviving partner cannot sue for a partnership debt, when he has not joined the representatives of the deceased partner, or has shown no authority as liquidator of the partnership affairs.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled and reversed, and that there be judgment against the plaintiff as in case of non-suit, with costs in both courts.

M'CASKEN *vs.* SMITH.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, FOR THE PARISH OF ST. MARY, THE JUDGE OF THE SIXTH PRESIDING.

Where a workman, by the job, demands more than is authorized by his contract, and, on being refused, leaves his work uncompleted, the adverse party may immediately employ other workmen to complete the job, and the former cannot recover, even if he returns and afterwards offers to perform the work.

A workman should be remunerated for his labor, but must, on his part, comply strictly with his contract.

This is an action to recover the sum of six hundred dollars, for plastering the defendant's house, according to a written agreement between them. The plaintiff alleges, that he had nearly finished plastering the house, when, without any just cause, he was discharged by the defendant; but, that he has offered to finish said work in a workmanlike manner, as agreed on, but that the defendant refuses to permit him. He prays judgment for the entire sum agreed on.

The defendant pleads a general denial, and avers that he was not bound to pay the plaintiff as the work progressed, but only on its completion. That he, however, paid him one hundred dollars in cash, and that he afterwards refused to go on with the work, or allow any other person to complete it, unless the defendant would give him his notes. Defendant hired other men to do the balance of the work, which cost him five hundred dollars, and he considered the contract between them at an end. He pleads these two sums, amounting to six hundred dollars, in compensation; and also produced an account for negro hire in assisting plaintiff, and for board, &c., amounting to five hundred and five dollars, for which he prays judgment in reconvention.

The evidence sustained the defendant's defence as regards the conduct of the plaintiff in quitting the work and leaving it unfinished. Part, only, of the accounts set up in the answer, were proved.

There was judgment, however, in favor of the plaintiff for one hundred and twenty dollars, and the defendant appealed.

Gibbon, for the plaintiff, submitted the case.

Dwight, for defendant, explained the contract between plaintiff and defendant, and showed its violation on the part of the former, and urged that the defendant recover his demand set up in reconvention.

Simon J., delivered the opinion of the court.

Plaintiff claims six hundred dollars, as the amount of a contract for work to be done to defendant's house. He alleges, that although the work was not entirely finished, he is entitled to the whole amount of his contract, because the defendant dismissed him without any just or legal cause.

Defendant pleads several matters in avoidance, and avers that he did not dismiss the plaintiff; that said plaintiff, having violated his contract by requiring defendant to pay him the whole amount to be due on the completion of the work, before the same was finished, or to give him his note for it, he, defendant, refused. Whereupon, plaintiff abandoned his work, and declared that he would not go on to complete it and fulfil his contract; that defendant, considering the contract at an end, employed other workmen to finish the work. He further pleads payment of one hundred and ninety dollars, claims compensation for the hire of negroes, and for what he has been obliged to pay to other workmen to complete the work, and prays that plaintiff's claim be rejected.

The District Court gave judgment in plaintiff's favor for one hundred and twenty dollars, and the defendant appealed.

The contract shows that payment for the work was to be made as it progressed, if required, and the balance when finished.

It appears, from the evidence, that plaintiff began to work in February. On the 24th of May following, he signed a receipt for one hundred and ninety dollars. About the time

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he signed the receipt, plaintiff told defendant that he would not go on with the work unless defendant would give him his note for the work which was to be done. This defendant refused. Plaintiff then went to Franklin; and when he returned, he said he would go on with the work, but defendant replied that as he had broken his contract, he did not want him to finish the work. Defendant employed another workman. Plaintiff did not work any more, and what he had done was about one-half of the contract. Defendant paid upwards of three hundred dollars to the other workman to finish the work. The evidence shows, also, that plaintiff had employed three of defendant's negroes during the time he worked for him. Their hire is valued at one dollar and fifty cents per day. One of them worked for two weeks, and the two others for about two months.

We are satisfied, from the facts of the case, that if the plaintiff did not complete his contract, it was owing to his own fault. He had no right, under said contract, to demand payment for the work to be done. It was to be paid for as it progressed, and the balance when finished. He asked defendant one hundred dollars, which defendant did not refuse; and when he notified defendant that he would not go on with the work, and went to Franklin, we believe defendant was then authorized to employ another workman, as he was not obliged to wait until plaintiff thought proper to return; of this, plaintiff cannot complain, as his unreasonable pretensions were, from the evidence, the only cause of the difficulty. It is certainly just that workmen should be renumerated for their labor, and that they should be protected against the bad faith or injustice of their employers, but on the other hand, they should comply strictly with their contracts; and in the present case, we are not ready to say that defendant was bound to submit to the caprice of an individual, who, regardless of his obligations, showed himself determined to violate his contract. The principles established by this court, in the case of *Hayes* vs. *Marsh*, 11 *Louisiana Reports*, 372, would, in our opinion, be applicable to this case.

With this view of the question, and as the defendant has

Where a workman by the job demands more than is authorized by his contract, and on being refused leaves his work uncompleted the adverse party may immediately employ other workmen to complete the job, and the former cannot recover, even if he returns and afterwards offers to perform the work.

A workman should be remunerated for his labor, but must on his part comply strictly with his contract.

only prayed that the plaintiff's demand be rejected, we think the District Court erred in allowing him one hundred and twenty dollars. The defendant paid plaintiff one hundred and ninety dollars; the hire of his slaves amounted to more than one hundred and ten dollars, only one-half of the work was done when plaintiff declined to go on with his contract, and defendant having been obliged to employ another person, had to pay him upwards of three hundred dollars, thus he was fully compensated for the work he had done. On the whole, we are unable to discover how the judge *a quo* could give judgment in favor of the plaintiff.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, and that ours be for the defendant with costs in both courts.

MILES *vs.* HIS CREDITORS.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, FOR THE PARISH OF ST. LANDRY, THE JUDGE OF THE SEVENTH PRESIDING.

In a contest between the vendor and vendee, where the latter has had the use and enjoyment of the property mortgaged, he cannot demand interest on the price he has paid, in case he gives it up under the mortgage. So, in a contest between two creditors, of the proceeds of mortgaged property in the hands of a syndic, to be allowed their respective claims, the vendee who had paid part of the price, was in possession and had the use, but gave up the property, cannot claim *interest*, which is satisfied by the use and enjoyment of the property.

This case arises on the opposition of Catharine McDonald, wife of the ceding debtor, and separated in property from him, to the proceeding of the syndic, in allowing one John L. Daniel the return of a certain sum of money, which he had advanced on the price of a house and lot, purchased by him of Miles, but to which the latter was unable to make him a title.

WESTERN DIST. *September*, 1840.

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The opponent's suit for a separation of property, was cumulated with the insolvent proceedings, to determine her rights contradictorily with the creditors, and ascertain the amount due to her.

Miles had purchased a house and lot in Opelousas, from B. Vanhille, for two thousand five hundred dollars, which he sold by private act to Daniel, who bound himself to pay the balance due Vanhille, and to give Miles seventeen hundred and fifty dollars; *the latter* obligating himself to make a complete unencumbered title to the same, within six months. Before the expiration of this time, Miles made a cession of his property. In the mean time, Daniel had occupied the house and lot, and made some improvements, and paid to Vanhille fourteen hundred and thirty dollars, on the original price, and was subrogated to Vanhille's right against Miles, for this amount.

The district judge allowed Daniel six hundred dollars, for his improvement, and placed him as a mortgaged creditor, for this sum, and the sum of fourteen hundred and thirty dollars, which he paid to Vanhille, with 10 *per cent, interest*, on the latter sum.

It was the interest, which was opposed by the wife of the ceding debtor; she having a mortgage on all his property, for the reimbursement of her claim and judgment. From this part of the judgment she appealed.

Voorhies, for the plaintiff and opposing creditor. The judgment of the inferior court should be reversed, for allowing interest, as regards the issue between the plaintiff and Daniel. He had contracted to pay the amount of the claims due by Miles to Vanhille, which was in the nature of a condition precedent; and in paying them, he did but pay a part of the price he was to give, which formed part of the consideration of the transfer from Miles.

2. He was in possession of the property, which formed the consideration of the demand, under a contract of sale, and when he paid these installments, due by Miles to Vanhille, the qualities of debtor and creditor were united in him, and

the demand was extinguished by confusion. *Louisiana Code, arts.* 2437, 2431, 2214.

3. Daniel was immediately put in possession of the property, and in the use and enjoyment of it; and the fruits and revenues were received by him, which should compensate, and be more than equivalent for the interest on the price, or any part thereof. He should, either have been made to pay for the fruits and revenues, or his claim for interest should have been disallowed. *Louisiana Code, art.* 2895. 3 *Louisiana Reports*, 393.

4. The position of the parties here, are similar to that of parties to a *venté à reméré*, when the holder of the property enjoys the fruits and revenues, and the vendor enjoys the price, free from interest; the fruits and revenues, being considered equivalent to interest. *Patterson* vs. *Bonner*, 14 *Louisiana Reports*, 235. *Pothier, contrat de venté*, Nos. 416, 417, 418, 419. 4 *Kent's Commentaries*, 72–3.

T. H. Lewis, for the appellee, Daniel.

Simon, J., delivered the opinion of the court.

On the 27th of October, 1835, Miles purchased of B. Vanhille, a house and lot in Opelousas, for two thousand five hundred dollars; ten hundred and sixty-two dollars were paid in cash, and the balance was made payable, one-half on the 1st of October, 1836, and the other half, on the 1st of March, 1837, with ten per cent. interest, on each payment from maturity; mortgage reserved in favor of vendor. On the 29th of March, 1836, Miles made a contract with Daniel, whereby he bound himself, within six months from date, to make a good and valid transfer to the latter, of the house and lot in question, free from all liens, &c., except the mortgage of Vanhille; in consideration of which, Daniel obligated himself to pay the balance due to Vanhille by Miles, and to pay the latter the further sum of seventeen hundred and fifty dollars, whenever Miles should make him a valid and unencumbered title to the property. Daniel, a few days afterwards, took possession of the property, and was in posses-

sion of it in April, 1836. In consequence of this last contract, Daniel paid Vanhille the amount of the two instalments, and on the 23d of March, 1837, obtained from the latter, a conventional subrogation to all his rights of mortgage. It is to be remarked, that the six months had expired before the installments became due, and Miles had not, within the time specified, made any transfer of the property to Daniel, in compliance with his contract. In the mean while, Daniel continued in possession of the property for some time, and afterwards rented it to another person. In May, 1836, Miles sued his creditors, a syndic was appointed, and in November following, his wife having sued him for a separation of property, the liquidation of her rights was cumulated with the suit for a surrender, and her said rights were subsequently settled, contradictorily with her husband's creditors, in the judgment appealed from.

It is contended by Daniel that, by virtue of his conventional subrogation, he is entitled to recover interest, at ten per cent., on the sum of fourteen hundred and thirty-eight dollars, by him paid to Vanhille, from the maturity of the installments.

On the other hand, the plaintiff avers, that Daniel having enjoyed the use and revenues of the property, represented in part by the sum due him, has no right *to claim interest;* and as she has to exercise her action of mortgage on said property, she insists on Daniel's obtaining strictly what may be due him out of the price thereof, and no more; considering that the balance of said price is to go to the satisfaction of her claims.

The court below, as far as regards the issue between these two persons, gave judgment in favor of Daniel, for the amount of the payment made to Vanhille, with ten per cent. interest, from the maturity of the installments, &c., and ordered the property to be sold, to satisfy the mortgage and privileged claims of both parties. From this judgment, *allowing interest*, the plaintiff appealed.

We are not ready to decide, that Daniel is entitled to have the benefit of both the interest on the amount by him paid to Vanhille, and of the use, enjoyment or rent of the property, to the prejudice of the plaintiff. In whatever light we con-

sider the contract between him and Miles, it is immaterial to the determination of this question; said contract was the only cause or origin of his possession; and when he obtained the conventional subrogation from Vanhille, he was not ignorant that Miles having made a surrender of his property to his creditors, in which the property in question was included, he could no longer make him a good and valid transfer of it, free from all liens and encumbrances, as Miles had obligated himself to do, within six months; nay, the six months had expired before the installments became due; and as the contract was perhaps then at an end, it would have been easy for Daniel to withdraw from the property, and to make his contract with Vanhille entirely independent and distinct from his original contract with Miles. If, on the contrary, Daniel intended to maintain his first contract, although he was aware that the property could no longer be transferred to him, free from liens and encumbrances, and particularly from the plaintiff's legal mortgage, or in other words, if he considered himself the vendee of the property, under Miles' promise of sale, there was no necessity for a conventional subrogation, as a legal one would have been sufficient to protect him in not paying to Miles' syndic more than the seventeen hundred and fifty dollars he had agreed to pay. However it is, the parties stand before the court, as Miles' mortgaged creditors, their rights are to be determined as in a *concurso*, and if so, it is a well recognized rule, that in a contest between the creditors of an insolvent, relative to the justice of their claims, they are all plaintiffs and defendants, and each may dispute the claim of the other, not only in relation to the validity and preference of their respective rights between each other, but also upon any legal ground which the debtor himself could have used to defeat their claims. In this case, had the contest existed between Daniel as creditor and Miles as debtor, there is very little doubt, but that the latter could have successfully resisted the demand of interest, on the reconventional plea of use and enjoyment of the property mortgaged; nay, he might perhaps have obtained a reduction of the principal. Why not so the plaintiff, who is particularly interest-

In a contest between the vendor and vendee, where the latter has had the use and enjoyment of the property mortgaged, he cannot demand interest on the price he has paid, in case of an eviction under the mortgage.

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ed in reducing Daniel's claim, and for whose exclusive benefit the reconventional plea can only now be used? We think the district judge erred, in allowing Daniel the interest by him claimed, on the amount paid to Vanhille.

So, in a contest between two creditors, of the proceeds of mortgaged property, in the hands of a syndic, to be allowed their respective claims: the vendee, who had paid a part of the price, was in possession, and had the uses, but gave up the property, cannot claim *interest*; which is satisfied by the use and enjoyment of the property.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court, so far as it relates to the interest claimed by Daniel, on the sum by him paid to Vanhille, be annulled, avoided and reversed; that said Daniel do recover only (exclusive of his other claims,) the principal, out of the price of the property ordered to be sold, to satisfy his and plaintiff's claims, and, that said judgment, in all its other parts, be affirmed; the appellee paying costs in this court.

THIBODEAUX'S HEIRS *vs.* THIBODEAUX.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF ST. LANDRY.

In settling a community between a surviving partner and the heirs of the deceased, reference must be had particularly to the situation of the affairs of the community at the time of its dissolution. No evidence will be received of the amount of property in possession, after the dissolution of the community, *except at the time*; nor at the time of the second marriage of the surviving partner.

This is an action by the legitimate heirs of the deceased wife of the defendant, in right of their mother, in which they claim an amount, say fifteen hundred dollars, alleged to be part of the community property existing between their late mother, and the defendant, their father, as her half of the community existing at her death. They allege, that at the death of their mother, there was no inventory taken, and that the defendant has since intermarried with another woman, and refuses to settle with them; and that he estimates his separate property which he brings into the second marriage at

three thousand dollars. They insist that the estimated amount is not the real one; that there was community property at the death of their mother, their half of which was worth at least fifteen hundred dollars. They pray that a settlement take place, and that the defendant be condemned to pay over whatever amount be ascertained to be actually due.

The defendant pleaded a general denial, and averred that, in 1831, he intermarried with the plaintiff's mother, all of whom, except the youngest, were born out of wedlock. That he brought into marriage five thousand dollars, and their mother nothing, either at the time or during marriage. That during marriage, there were no acquests and gains, but, on the contrary, losses; and the deceased left no property. That on his second marriage, in 1836, he brought in property valued at three thousand dollars; and that, whatever may have been the actual value, it was all his separate property. He prays that the plaintiff's demand be rejected.

There were several witnesses examined touching the amount and character of defendant's property during the marriage, and at the beginning of second. The judge of probates was of opinion the plaintiffs showed no community property existing during the first, or beginning of the second marriage. There was judgment for the defendant, and the plaintiffs appealed.

Linton, for the plaintiffs.

1. The plaintiffs, the offspring of defendant's first marriage, having been legitimated by a subsequent marriage, have the same rights as if born during marriage. *Louisiana Code, article* 219.

2. The court below erred in permitting the defendant to contradict, by evidence, his marriage contract with his second wife. It is a notarial instrument, and the recital and acknowledgment that he brought so much to the second marriage, was binding upon him in favor of the heirs of the first. *Louisiana Code, articles* 2233–4; *Starkie on Evidence, vol.* 3, *p.* 1020.

Voorhies, for the defendant, said there was no evidence in the record explaining or contradicting the marriage contract with the second wife of the defendant. It was the plaintiffs who attempted to introduce it, but it was properly rejected.

2. The only question at issue is, the amount of the community property. It is shown, that community commenced with the marriage, and terminated with its dissolution; consequently, it was only competent for the plaintiffs to show the property owned, by either of the parties, at the time it was contracted, that received while it continued, and that existing when it was dissolved by the death of the wife. *Louisiana Code*, 2369–70; 7 *Louisiana Reports*, 221; 9 *Idem.*, 538; 10 *Idem.*, 25; 3 *Martin*, 119–20–21.

Simon, J., delivered the opinion of the court.

The object of this suit, is the settlement of the community alleged to have existed between the defendant and the plaintiffs' mother, and the recovery of whatever sum may be found to be due said plaintiffs in right of their said mother. The petition does not specify any particular property belonging to the community, and the plaintiffs' claim appears to be predicated solely on an acknowledgment made by defendant in his marriage contract with his second wife, that his estate consists in sundry property estimated at three thousand dollars.

Defendant avers in his answer, that when he contracted marriage with plaintiffs' mother, he had property to the amount of five thousand dollars; that his first wife brought nothing into the marriage, nor did she receive any kind of property during said marriage, either by inheritance, donation, or otherwise. He further states, that far from there being any acquests and gains, his own estate had diminished in quantity and value, so that, at the time of the dissolution of the marriage, there being no property in community, there was no necessity for any inventory.

On the trial the plaintiffs attempted to show, by witnesses, the amount of property which the defendant had at the time of his second marriage, and the evidence having been objected to, was rejected by the court. In settling a community be-

In settling a community between a surviving partner and the heirs of the deceased, reference must be had particularly to the situation of the affairs of the community at the time of its dissolution. No evidence will be received of the amount of property in possession, after the dissolution of the community, *except at the time*; nor at the time of the second marriage of the surviving partner.

tween a surviving partner, and the heirs of the deceased, it is clear that reference must be had particularly to the situation of the affairs of the community, at the time of its dissolution; and between husband and wife, although the effects, reciprocally possessed by them at the dissolution of the marriage, are presumed to belong to the community, yet this presumption must yield to proof of the contrary; *Louisiana Code, article* 2374. In order to arrive at this proof, and to a fair settlement of the rights of the parties to the community, it is necessary to consider, 1st, the property which the spouses had at the time of their marriage: 2d, That which they received or acquired during the marriage; and 3d, The property and effects which they reciprocally owned and possessed at its dissolution. 7 *Louisiana Reports*, 221. We are unable to perceive what weight the evidence of the amount of property, which the survivor possessed at the time of his second marriage or at any other subsequent period, can have on the decision of this cause; if his estate had increased since the death of his first wife, her heirs cannot set up any claim to it under the well known rule of law, that the community ceases by the decease of one of the partners. The evidence was certainly irrelevant, and the court below did not err in refusing to permit its introduction.

On the merits, we are satisfied that the evidence fully justifies the defendant in his position; that there was no necessity for an inventory; the whole of the property he possessed was his; there were no acquests and gains; nay, it is even shown that he was worth four hundred dollars less at the time of the death of his first wife, than he was when he married her, and the plaintiffs have adduced no proof to the contrary.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be affirmed, with costs.

KEMPER'S HEIRS *vs.* HULICK.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, FOR THE PARISH OF ST. MARY, JUDGE LEWIS PRESIDING.

The allegation of ownership is necessary in a possessory action, in order to show the capacity in which the party claims possession of the property.

Where the prayer of the petition shows it to be exclusively a possessory action, the defendant by setting up title, cannot turn it into a petitory one.

This is a possessory action, in which the plaintiffs claim the possession of a negro man named Stephen, which they allege, they and their ancestor, Nathan Kemper, had been a long while in the quiet and peaceable possession, say, fifteen years; until the defendant, without their knowledge or consent, about the 9th of April, 1837, inveigled and enticed him away from their lawful possession, and still retains him. They pray that the defendant be required to deliver up said slave, and pay them five hundred dollars in damages.

The defendants excepted to the petition, and averred that the plaintiffs had, on or about the 13th April, 1837, instituted a petitory action against her, for the slave Stephen, and afterwards dismissed it; whereby they are prohibited from bringing a possessory action.

The case was tried on this exception. The record of the former suit was produced in evidence. The petition alleges that "the slave Stephen was the property of Nathan Kemper, their deceased ancestor, and after his death, continued to be the property of, and *in possession* of petitioners, until the 9th April, 1837, when one Eliza Hulick, inveigled said slave from the plantation, &c." They pray that "Eliza Hulick be adjudged to *deliver up the possession* of the slave Stephen, &c.; *and for general relief.*"

The defendant joined issue, and avowed that said slave never was the property of Nathan Kemper deceased, or of the plaintiffs, but that her deceased husband, William Kemper, was the true owner for many years, and up to his death, and

he was inherited by his minor son, her child, of whom she is the tutrix. That said slave was in the possession of her deceased husband at his death, and has continued in her possession ever since. She prays that the plaintiffs' suit be dismissed.

The plaintiffs voluntarily dismissed this suit the same year, and have since instituted the present one.

The district judge gave judgment sustaining the exception, and the plaintiffs appealed.

Splane, for the plaintiffs.

Gibbons, for the defendant, insisted that the plaintiffs set up title to the slave, which, coupled with the prayer for general relief, would sustain a petitory action. This being the case, they must confine themselves to this action. It being the higher or greater one, the lesser or possessory action was merged in it. The judgment sustaining the exception was, therefore, proper.

Morphy, J., delivered the opinion of the court.

This is a possessory action, to which defendant excepted, on the ground that plaintiffs had heretofore brought a petitory action for the same property, which they had discontinued. This exception having prevailed, the plaintiffs appealed.

Our only inquiry must be, as to the nature of the first suit. If it was a petitory one, the exception was properly sustained. *Code of Practice, article* 54.

On examining the first record, we cannot view it in any other light than that of a possessory action. After setting forth all the material circumstances required by the Code of Practice in possessory actions, the petition concludes with a prayer that defendant be decreed to deliver up, to plaintiffs, the possession of their slave, &c. In her answer, the defendant sets up title. We have been at a loss to discover what circumstance could have induced the judge below to consider the first suit as a petitory action, unless it be an allegation of ownership, to be found in the body of the petition. But this allegation was a proper one in a possessory action. It was

The allegation of ownership is necessary in a possessory action, in order to show the capacity in which the party claimed possession of the property.

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Where the prayer of the petition shows it to be exclusively a possessory action, the defendant by setting up title, cannot turn it into a petitory one.

necessary to state in what capacity plaintiffs had been in possession of the slave, when disturbed. *Code of Practice*, article 47. The prayer of the petitioner, which determines the character of the action, shows this one to have been exclusively possessory; and the defendant, by setting up title, could not change it into a petitory one. Had the suit proceeded to trial, all evidence of title would have been excluded; because, in mere actions, *recuperandæ possessionis*, the fact of possession alone, is at issue.

It is, therefore, ordered, that the judgment of the court below be annulled, avoided and reversed, and it is further ordered, that the exception to plaintiffs' action be overruled, and the case remanded to be proceeded in according to law, the defendant and appellee paying costs in both courts.

GILLET ET AL. *vs.* THEALL.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, FOR THE PARISH OF LAFAYETTE, THE JUDGE OF THE SIXTH PRESIDING.

Where cotton is shipped to dry good merchants with instructions to be sold on the levee, if ten and a half cents per pound could be had, and if not, to store it, and the consignees immediately employ a broker to sample it, but not finding a buyer it is stored and soon after *destroyed by fire: Held*, that the consignees are *not liable*; although it is admitted the market price at the time, of the arrival of the cotton, was twelve and a half cents per pound.

The consignees being dry good merchants, are considered as having used sufficient diligence by forthwith employing a cotton broker to effect a sale.

This is an action on two promissory notes of the defendant, and a merchants' account. The latter admitted the execution of his notes, and the account was proved. He, however, averred that he had sent to the plaintiffs in New-Orleans

six bales of cotton, worth four hundred dollars, which they had failed to place to his credit, and which he prayed might be allowed.

The evidence showed that, on shipping the cotton, the defendant wrote to the plaintiffs to "receive it, and when sold to place the proceeds to his credit. As I gave ten cents for it here, says he, it must bring ten and a half cents at least in New-Orleans. If it will not sell for that price on the levee, have it stored until I give further instructions or come to town. Your young man told me you were shipping cotton to France, and probably it would be to your interest to take it at that price, as the quality is very good."

A broker was employed to dispose of the cotton, who sampled it to be sold on account of the plaintiffs, but a sale not being effected on the levee it was stored, and soon afterwards burnt. It was admitted, that at the time this cotton arrived in New-Orleans, cotton was selling at twelve and a half cents per pound, and that this was good cotton and worth that price. The bales averaged 400 pounds each.

The district judge allowed the set off; estimating the cotton at ten and a half cents per pound, and 400 pounds to the bale, it amouuted to two hundred and fifty-two dollars, which was deducted from the plaintiffs' demand, and judgment given for the balancce, from which the plaintiffs appealed.

Voorhies, for the plaintiffs, insisted on the reversal of the judgment.

The plaintiffs having acted as his attorney or agent, and conformably to his instructions, are not responsible for the loss of the cotton which was destroyed by fire, in the warehouse where it was stored. There is no evidence adduced by the defendant that the price limited in his letter could have been obtained for the cotton on the levee: he was bound to make proof of the fact; the plaintiffs could not prove a negative. It is only for his unfaithfulness, fault or neglect, that the agent is responsible. *Civil Code, article* 2972.

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BELLET ET AL. vs. THEALL.

The procuration was gratuitous. The plaintiffs were dry goods and not commission merchants. The cotton was sent to them to be sold, without charging commission, and the proceeds to be applied in part payment of their account sued on. *Louisiana Code, articles* 2960 *and* 2972.

T. H. Lewis, contra, urged the affirmance of the judgment. There was no opposition to the plaintiffs' demand. It was only the price of cotton set up in compensation that was disputed. It was properly allowed, as the evidence fully shows the plaintiffs could have sold the cotton for the sum at which it was limited. In storing the cotton they should have insured it.

Morphy, J., delivered the opinion of the court.

This suit is brought on two promissory notes, and on an open account for goods and merchandize sold to the defendant. The claim is not disputed, but the defendant opposes as an off-set, the value of six bales of cotton forwarded to the plaintiffs in New-Orleans, with orders to sell them and place the proceeds to his credit. This offset having been allowed, the plaintiffs appealed. The defendant, in a letter enclosing the bill of lading to plaintiffs, directed them to obtain at least ten and a half cents per pound for his cotton, and in case it would not sell for that price, on the levee, to have it stored until he should give further instructions, or come to town. There is an admission on record that at the time defendant's cotton reached the city, the market price was twelve and a half cents per pound; and that this cotton, which was of good quality, was worth that price.

Where cotton is shipped to dry goods merchants with instructions to be sold on the levee, if ten and a half cents per pound could be had, and if not, to store it; and the consignees immediately employ a broker to sample it, but not finding a buyer it is stored and soon after *destroyed by fire: Held*, that the consignees are *not liable*; although it is admitted the market price at that time, of the arrival of the cotton, was twelve and a half cents per pound.

The evidence shows that, upon the arrival of the cotton, one George Heno, was employed by plaintiffs to sample it, in order to sell it; but that, not having been sold on the levee, the cotton was stored in a ware-house, wherein, shortly after, it was destroyed by fire. To escape the operation of the well known rule "*res perit domino*," the defendant contends that the loss of this cotton must be borne by plaintiffs, because they have neglected to sell it on the levee pursuant to his

orders; that being authorized to sell at ten and a half cents per pound they could have easily disposed of it, and that, at all events, they have failed to show any exertion or diligence. To this the plaintiffs answer, that having employed a broker to attend to the sale, they have done all that could reasonably be expected of them; and that if he has not succeeded in selling, the fault is not theirs. The high price of the market might well raise the presumption that a sale could have been effected on the levee, at the price fixed by defendant; but from the fact of no purchaser having been immediately procured, it does not follow as a necessary consequence that the plaintiffs did actually neglect or disobey the defendant's instructions. The plaintiffs were dry goods, not commission, merchants; and we think they showed sufficient diligence by forthwith engaging a cotton broker to effect the sale. Their interest as well as the broker's was to sell, had any offer been made during the limited time the property or merchandize is suffered by the city ordinances to incumber the levee. The cotton was destroyed after it had been stored pursuant to the defendant's order; and it is not shown that plaintiff's were guilty of any fault or neglect in not selling it before. They pursued, for their principal, the course they would have followed for themselves, had the cotton been theirs. Upon the whole, we are of opinion that the offset was improperly allowed.

The consignees being dry goods merchants, are considered as having used sufficient diligence by forthwith employing a cotton broker to effect a sale.

It is, therefore, ordered that the judgment of the district court be annulled, avoided and reversed; and proceeding to give such judgment; as, in our opinion, ought to have been rendered below: We adjudge and decree, that the plaintiffs do recover of the defendant eleven hundred and fifty-four dollars and ninety-one cents, with legal interest, from judicial demand, on nine hundred and thirty-four dollars and two cents, amount of the two notes sued on, and costs in both courts.

WALKER ET AL. *vs.* MARTOLO.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, FOR THE PARISH OF LAFAYETTE, THE JUDGE OF THE SIXTH PRESIDING.

Where the appellant fails to cause citation of appeal to issue, he will not be entitled to relief under the 19th section of the act of March 20th, 1839, "amending the Code of Practice;" but in such cases the appeal will be dismissed.

This was a redhibitory action, in which there was a verdict and judgment for the defendant. The plaintiff appealed.

The appeal was granted in December, 1838, returnable to the next term of the Supreme Court, at Opelousas, in September, 1839. This term failed and the record was not filed until September term, 1840. The appeal bond was dated September 11th, 1840. It did not appear from the record that any citation of appeal ever issued.

Neveu, for the defendant and appellee, moved to dismiss the appeal, for want of a citation of appeal; and also, on the ground that the appeal bond was not given within the time required by law.

Splane, contra, insisted that it was customary to waive citations of appeal, among the members of the bar in the fifth district, and to accept service on the record.

2. As there is no service of citation accepted in this case, the appellant should be allowed, under the new law, a continuance and time to make service of citation. *Session acts of* 1839, *sec.* 19, *page* 162.

Martin, J., delivered the opinion of the court.

In this case the appellants having failed to cause citation to issue, the defendant and appellee has moved for the dismissal of the appeal.

It is contended that by the act of 1839, section 19, for "any defect, error or irregularity in the citation of appeal or service thereof," the appellant may have time allowed him to make

service, and that this case should be continued for that purpose.

This is a widely different case from that contemplated by the act of the legislature relied on. Here there was no citation issued. It is the duty of the appellant to see that the necessary steps are taken which are required by law to bring up his appeal and place it legally before this court. Citation is the ground work, and without it no proceedings can be had on the appeal.

It is, therefore, ordered that this appeal be dismissed, with costs.

DUPRE *vs.* SPLANE.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, FOR THE PARISH OF ST. MARY, THE JUDGE OF THE SIXTH PRESIDING.

An authority to an agent or attorney at law to collect a debt does not authorize him to novate it or enter into a compromise.

But where an agent, in the honest exercise of his judgment, makes an unauthorized settlement by receiving part of the debt in cash and the note of another person for the balance, and apprizes his principal, the latter must disapprove of it in a reasonable time, or his silence will be considered an approval.

The principal must make his election. He cannot hold his agent liable, and at the same time avail himself of his acts, if they should be advantageous.

So where the agent had a note to collect, and not being able to get all in money, and fearing the insolvency of the debtor, took a note on another person for the balance which was not paid, but of which he advised his principal, who made no objection at the time: *Held*, that the agent was not bound for the loss.

This is an action to render the defendant liable as agent, or attorney at law, for the balance on a promissory note placed in his hands for collection.

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The plaintiff alleges that in October, 1830, he put in the defendant's hands, as his attorney at law, for collection, a note on one J. L. Johnson, for six hundred and forty dollars, bearing interest. That he did collect said note in 1831, from James Plaisted, Esq., the agent of Johnson, and is consequently bound for the whole amount of said note and interest; but that he has failed to pay over any part of it except three hundred dollars. He prays judgment for the balance due thereon.

The defendant admits he received the note for collection as stated. That at the time it was put into his hands Johnson, the maker of the note, was dead and the solvency of his estate very doubtful. That it was understood that he was to use his best efforts to secure the debt, so as to prevent its loss. That in accordance with what he considered his instructions he made an arrangement with J. Plaisted, the attorney and agent of Johnson's estate, received three hundred dollars in cash and took Levi Foster's note for four hundred and twenty-six dollars, bearing interest at the rate of ten per cent. per annum, who was then deemed solvent, and the arrangement considered advantageous, all of which was forthwith communicated to the plaintiff, who, far from objecting, substantially ratified and approved it. That suit was instituted for the recovery of Foster's note, with the knowledge and consent of the plaintiff, and which was stayed by injunction; and in the mean time Foster died, and his wife's and other mortgaged claims swallowed up his estate. He farther pleads prescription and reconvenes for damages. Upon these pleadings and issues the cause was tried by the court.

The evidence supported the facts mainly set out in the pleadings.

Plaisted, with whom the transaction was made, and agent of Johnson's estate, believed that both it and Foster were solvent at the time; but that Foster was slow in payment, and he preferred giving "Foster's note in discharge of the balance against Johnson's estate; not having yet collected money enough to pay it.

There was abundant testimony to show that Foster was in possession of a large property at the time this note was due, and for a year or two afterwards; and that suit was commenced, which was stayed by injunction, its trial delayed, and before final judgment Foster died. His estate being encumbered, with mortgaged and privileged claims, the amount of this note was lost.

The transaction was made in 1831, and a correspondence kept up between the parties to 1834. The defendant apprised the plaintiff of what he had done, and paid over the three hundred dollars he received in part payment.

In the last letter, dated December 6th, 1833, the defendant wrote to the plaintiff as follows:

"Your esteemed favor of the 22d ultimo, is now before me. In reply I have to say as respects the claims of Lawson, (in whose name the debt now sued for by plaintiff,) that I have not as yet the money. Property has been seized by the sheriff to satisfy the claim, but not yet sold. I will use every endeavor to have the money made as soon as possible. Johnson's estate is insolvent, and I secured the debt by getting Foster's note. I have done every thing in my power to collect it, so you must not think hard of me or be uneasy."

This is the last piece of evidence in the record. In the year following this last letter, Foster's estate having proved insolvent, the plaintiff instituted this suit to render the defendant responsible for the balance due on the original claims against Johnson's estate. There is no evidence that the plaintiff ever disapproved or disavowed the arrangement made by his attorney, until the failure to collect Foster's note. On the whole evidence of the case, and after arguments of counsel, the district judge gave judgment for the defendant, and the plaintiff appealed.

Gibbons, for the plaintiff, submitted the case.

Voorhies and *Splane*, in *propria personæ*, contra.

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An authority to an agent or attorney at law, to collect a debt, does not authorize him to novate it or enter into a compromise.

But where an agent, in the honest exercise of his judgment, makes an unauthorized settlement by receiving part of the debt in cash and the note of another person for the balance, and apprises his principal, the latter must disapprove of it in a reasonable time, or his silence will be considered an approval.

The principal must make his election. He cannot hold his agent liable, and at the same time avail himself of his acts, if they should be advantageous.

So, where the agent had a note to collect, and not being able to get all in money and fearing the insolvency of the debtor took a note on another person for the balance which was not paid, but of which he advised his principal who made no objection. *Held*, that the agent was not bound for the loss.

Morphy, J., delivered the opinion of the court.

Plaintiff seeks to recover the balance of a note, placed for collection in the hands of defendant, as his attorney at law; the estate of the drawer of this note being at that time unable to pay its whole amount, and defendant entertaining some doubts as to its ultimate solvency, he made an arrangement with the agent of the heirs, in September, 1831; he received three hundred dollars in part payment, and took for the balance the note of one Levi Foster, who at that time was possessed of a large amount of property and was generally considered as good; some time after, however, he died and his estate was found to be insolvent; proceedings had been instituted against said Foster, and every exertion made by defendant to collect the amount of the note, which has never been paid.

It is clear that a power to an agent or attorney at law, to collect a debt does not authorize him to make a novation or to enter into a compromise. *Louisiana Code, article* 2966. But it is equally clear that when, in the honest exercise of his judgment, an agent takes upon himself to make an unauthorized settlement, believing it advantageous to his principal, and apprises him of it, the latter is bound to express his disapprobation within a reasonable time; if he continues to correspond with his agent on the same business, without objecting to the settlement made for him, he must be considered as approving it; had the agent reserved some means of securing himself in the event of his arrangement being rejected, he would have been induced to neglect them. A principal must on such occasions make his election; he cannot hold his agent liable for his unauthorized acts, and at the same time seek to avail himself of those very acts, in case they turn out to be advantageous. In the present instance, the letters which passed between the parties up to the end of 1833, have left on our minds the impression that from the beginning plaintiff had been apprised of the settlement made by his agent; he received the three hundred dollars collected in consequence of it, and far from repudiating it as unauthorized, we find him in one of his letters urging defendant to collect the balance, which he had been told by the latter

was to be paid as soon as Foster's crop of sugar would be sold; we concur entirely in the view taken of this case by the judge of the inferior court.

It is, therefore, ordered, that the judgment appealed from be affirmed, with costs.

MARTIN ET AL *vs.* PATIN ET AL.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT FOR THE PARISH OF LAFAYETTE, THE JUDGE OF THE SIXTH PRESIDING.

It is only for plantations, inclosed and surrounded by other lands, so as to leave no way to the public road, that the right of passage, or of way, over the lands of others, is established by law.

The right of passage, over the land of others, is not given as a matter of convenience, but of necessity: So, where there is room to go round the lands of a neighbor, the right of passage will not be allowed to go through, and compel the latter to leave a lane.

This is an action, by sundry citizens, for the right of way, or passage, having farms in the Prairie Sorel, some distance from the wood, access to which is indispensable to them, for the purpose of getting timber. They allege, that two of their neighbors, (Ursin Patin and Narcisse Begnaud,) reside between them and the woods, and deny them the right of way, to pass over their lands. They pray that the defendants be required to allow them a direct and straight way through their land, with liberty to pass to and from said woods, and to bring timber for the use of their farms.

The defendants pleaded the general issue, and expressly deny that the plaintiffs have any claim to such right of way, without first indemnifying them, and paying for all the damages they may sustain, if the right of way is allowed.

The plaintiffs showed, by evidence, that some of them lived six miles from the woods, and have no fire-wood, or fencing, except as they get it from this wood. That they have been in the habit of bringing timber along a road nearly in

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a direct line, for the use of their farms. This road, ran in part between the lands of the two defendants, and the last spring, they (defendants,) interrupted this road, by connecting their fences, and cutting a ditch across, thus obstructing six or seven arpents in length. Each of them had a separate fence, along this part of the road, before; and it run on the property of both defendants, equally. There is another road, higher up, which the plaintiffs might travel to these woods, but it is longer; runs across some low grounds, and at some seasons of the year, it is impassable. The principal witness for the plaintiffs, supposes one hundred dollars would cover all the damages which the defendants could sustain, by the road continuing to run where it had been, when shut up by them.

The district judge gave judgment requiring the defendants to remove the obstructions placed by them across the road, within thirty days, after the sum of fifty dollars was tendered to each of them, by the sheriff, and to give to the plaintiffs, the right of way thereon. The defendants appealed.

Voorhies, for the plaintiffs. The plaintiffs claim a right of passage and of way, on the estate of the defendants. They have shown, by legal evidence, that this passage is absolutely necessary for them to procure wood and timber from the Prairie Sorel wood common, for the use and working of their farms, which are situated at a considerable distance. *Louisiana Code, arts.* 660, 670, 695, 698 and 702.

Crow and *Lewis*, for defendants.

Morphy, J., delivered the opinion of the court.

This action is brought to obtain a right of passage and of way over the estates of the defendants. The latter resist this pretension, on the ground that the plaintiffs are not legally entitled to the exercise of any such right.

An examination of the testimony has brought us to the conclusion, that the defendants are justified, by law, in their resistance to the claim set up by plaintiffs.

The *Lousiana Code, art.* 695, provides that "the proprietor, whose estate *is inclosed, and who has no way to the public road*, may claim the right of passage, on the estate of his neighbors, for the cultivation of his estate; but he is bound to indemnify them, in proportion to the damage he may occasion."

Article 696 says, "the owner of the estate, *which is surrounded by other lands*, has no right to exact the right of passage, from which of his neighbors he chooses. The passage shall be generally taken on the side where the distance is the shortest, from the enclosed estate *to the public road.*"

The evidence shows, that the farms of plaintiffs, are not inclosed and surrounded by other lands, so as to have no way to the public road. It is only for lands so situated, that the right of passage is established by law. A road across the lands of the defendants, would appear to be for the plaintiffs, a matter more of convenience than of necessity. The distance from their farms, to the several tracts of wood-land, owned by them in the *Prairie Sorel*, would be shorter through defendants' land, than around it. One of the witnesses says, "that there is another road, which the plaintiffs might travel to the woods, but that it is longer, and runs across some low grounds, so that in the winter season it is sometimes impassable." Another witness, speaking of this route, says, "that about fifteen or twenty arpents longer, would take persons round the pond, which, in winter, makes the longer road impracticable;" hence, it clearly appears, that the way claimed by plaintiffs would be more commodious, but is not absolutely indispensable to them. However great may be the inconvenience or hardships, resulting to them, from the refusal of the defendants, to allow them a passage through their property, this court does not consider itself authorized to interfere. The right of passage should be restricted in its exercise, to those cases coming clearly within the purview of the law.

It is only for plantations inclosed and surrounded by other lands, so as to leave no way to the public road, that the right of passage or of way, over the other lands, is established by law.

The right of passage over the land of others, is not given as a matter of convenience but of necessity. So, where there is room to go round the lands of a neighbor, the right passage will not be allowed to go thro' and compel the latter to leave a lane.

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It is, therefore, ordered, that the judgment of the district court be annulled, avoided and reversed, and that ours be for the defendants; the costs of both courts to be paid by plaintiffs and appellees.

LESESNE AND EDMONDSON *vs.* COOK.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, FOR THE PARISH OF ST. MARY, THE JUDGE OF THE SIXTH PRESIDING.

Where factors or commission merchants receive a general power to sell, free of all limitations as to price, they cannot be made responsible, for any thing they may have done afterwards, with a good intention.

A factor who acts in good faith, is not responsible for errors of judgment.

The circumstance of the factor being a creditor of the shipper or consignor, and the necessity of advances being covered, will not justify a sale below the limited price.

Interest will be allowed on an open account, from another state, where a statute of that state is in evidence, authorizing it and fixing the rate.

This is an action on a factor's or commission merchant's account, for advances in money, and acceptances on a consignment of sugar. The plaintiff, after selling the defendant's sugar under full powers, to get the best price they could, and allowing all credits, claim a balance of two thousand and sixty-eight dollars and forty-one cents. These transactions took place in Mobile, in the state of Alabama; and interest is claimed, at the rate of seven per cent., according to the laws of that state. They pray judgment for the amount of their demand.

The defendant pleaded a general denial, and averred that, the plaintiffs received from him, a large consignment of sugar (forty-one hogsheads and two barrels,) of the best quality, which they bound themselves to sell for the highest price the Mobile market would afford, during the spring and summer

of 1836. But said agents neglecting their duty, kept the sugar in store, in an improper place, where it wasted about three hundred pounds per hogshead, or about two thousand pounds in all, making a loss of fifteen hundred dollars. That on the 6th of June, 1836, he wrote to them to sell without delay, and on the 20th, urged them again to sell. That on the receipt of these letters, he believes they could have sold the sugar, for twelve cents and a half, which would have produced the sum of five thousand five hundred dollars, for which it should have been sold. He expressly charges, that the plaintiffs, in violation of their duty as agents and factors, kept the sugar on hand until the following November, and sold it for nine cents per pound, by which he suffered a loss of two thousand three hundred and twelve dollars, and for which the plaintiffs are responsible. That he is not liable to pay interest, as charged. He prays that the plaintiffs' demand be rejected, and that he have judgment in reconvention, for two thousand dollars in damages. Upon these pleadings and issues, the case was tried.

The correspondence between the parties was produced in evidence, and the testimony of witnesses taken, as to the state of the Mobile sugar market at the time; all of which is fully stated, and recapitulated in the opinion of the court.

A statute of Alabama was in evidence, showing, that interest was allowable on open accounts, at the rate of seven per cent. per annum.

There was judgment for the plaintiffs, in the sum of two thousand and sixty-eight dollars and forty-one cents, with seven per cent. interest, from the 10th of December, 1836, the date of the account, until paid.

The defendant appealed.

Maskell, for the plaintiffs, contended, that a commission merchant or factor, who receives sugar for his principal, for sale, and instructions are given to sell at a stated price, which cannot be obtained, has a right to sell below the limited price, if he obtain the highest price, between the sale and inception of the suit. 7 *Louisiana Reports*, 131.

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2. Where no positive instruction is given, as to the price of a consignment, a draft, by consignor on consignee, will justify a sale, in order to meet it. 7 *Martin*, 68.

Dwight, for the defendant, urged various objections to the plaintiffs' account; that it did not show what disposition was made of the defendant's sugar.

2. The plaintiffs induced the defendant, to send his sugar to the Mobile market, and consign it to them, by the promise of extraordinary high prices, and afterwards mismanaged and neglected the sale; caused great delay and loss of weight, so that the price fell far short of what had been assured or guaranteed to the defendant, and his sugar was sacrificed.

3. No interest should have been allowed on an open account, and the judgment is for too much, even admitting the principles upon which the case was decided.

Garland, J., delivered the opinion of the court.

This suit is instituted to recover a balance of two thousand and sixty-eight dollars and forty-one cents, alleged to be owing on account of money advanced and a draft accepted on account of a quantity of sugar shipped by the defendant, who is a planter, in the Parish of St. Mary, to the plaintiffs, who were merchants in Mobile, in 1836. The defence is, that the plaintiffs received, on consignment, forty-one hogsheads and two barrels of sugar to sell, as commission merchants, and that they neglected their duty, disobeyed the orders of the defendant, stored the sugar, kept it on hand a long time, and finally sold it at a price much below what could have been obtained for it, whereby the defendant incurred a heavy loss, for which, he says, the plaintiffs are responsible.

The facts are, that the defendant, in the month of April, 1836, shipped the sugar and went to Mobile in the vessel with it, having previously informed the plaintiffs of it. The shipment was, perhaps, induced by the representations of the plaintiffs, as to the state of the market in that city. The

vessel arrived about the last of April, and the defendant was offered twelve cents a pound for the sugar, on the wharf, which he refused; one of the plaintiffs telling him he thought the market would be better in the course of a month. The defendant then directed the sugar to be stored, and saw it put in an open warehouse, with which he expressed himself satisfied. He remained some time in Mobile, and various efforts were made to sell the sugar, which proved unsuccessful. A part of it was put up at auction, and twelve and a quarter cents per pound offered for it, and refused by the defendant. On the 7th of May, the plaintiffs wrote to defendant, saying, the market was dull since he had left, and the maximum price for sugar was twelve and a half cents, and that only in small lots. On the 6th of June, the defendant wrote to plaintiffs, saying, "I think you would do well, to offer the sugar at twelve, or twelve and a quarter cents, in preference to continue the storage through the summer; please try and effect a sale, on some principle that will reimburse you," &c., &c.; and then goes on to say, "I had not a doubt, but that the article would have been in a greater demand before this time, when I left, but we must try and take it as it offers." On the 20th of June, 1836, the defendant again wrote plaintiffs, that he would submit his opinion to theirs, but that he thought it better to sell at any price, than to continue the storage, yet leaves it to their judgment, and says, "if you act agreeably, you will meet my approbation." This letter gave the plaintiffs a general power, and removed all limitations as to the price of the sugar, and they cannot be made responsible for any thing they have done since, with a good intention. *Louisiana Code, art.* 2975. It is shown, that the plaintiffs made various attempts to sell the sugar, but could not obtain the price asked by the defendant. The market, it appears, gradually declined from the time the sugar was stored, and continued to do so through the summer. The letter of the 20th of June, rescinding the limit, as to price, did not reach the plaintiffs, until towards the close of the month, and then, the evidence informs us, the business season had closed or was closing, in Mobile, and produce could

Where factors or commission merchants, receive a general power to sell, free of all limitations as to price, they cannot be made responsible, for anything they may have done afterwards, with a good intention.

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only be sold in small lots, for domestic consumption. To use the language of one of the witnesses, "only a city business was doing."

A factor is bound to do the best he can for the interest of his principal, and is responsible for any damages that may result from the non-performance of his duty, the unfaithfulness of his management, his fault or neglect; but when he acts in good faith, he is not responsible for errors of judgment, more particularly, when the principal concurs with him in opinion as to the state of a market, which, it appears, the plaintiffs and defendant did for some time. Some very sufficient reason should be given, to justify a factor selling produce consigned to him, at a price below the limit fixed. This court has decided, that the circumstance of the factor being a creditor, and the necessity of advances to the owner being covered, will not justify a sale below the limited price. 7 *Louisiana Reports*, 124. The plaintiffs had every inducement to sell the sugar at the highest price. They had made an advance of nearly five thousand eight hundred dollars on it, and it is reasonable to suppose, they were desirous of getting it back with their commissions. No bad faith is shown on the part of the plaintiffs, and it appears, they sold the sugar as early as they could, at the opening of the business season, in the autumn, at about nine cents per pound, which was the highest market price.

A factor, who acts in good faith is not responsible for errors of judgment.

The circumstance of the factor being a creditor of the shipper or consignor, and the necessity of advances being covered, will not justify a sale below the limited price.

A statute of the state of Alabama is in evidence, which allows interest, at the rate of seven per cent. per annum, on demands of this description, and it has been allowed by the court below.

It has been alleged, as an error apparent on the face of the record, that the judgment is for a larger sum than that claimed. The difference is only a few cents, and too unimportant to require correction.

Interest will be allowed on an open account, from another state, when a statute of that state is in evidence, authorizing it, and fixing the rate.

The judgment of the District Court, is, therefore, affirmed, with costs.

SEGUR *vs.* PELLERIN.

APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH OF ST. MARY.

Suits for the interdiction of idiots, or insane persons, must be brought in the *Probate Court*, and all the proceedings had there. The *Parish Court*, although it be the same judge, is without jurisdiction, *ratione materiæ*, to try such cases.

It is necessary that the parish judge should designate in all his proceedings the capacity in which he acts; and the proceedings of the Probate Court must be conducted and kept distinct from those of the Parish Court.

In a suit for interdiction, service of petition and citation, must be made on the person sought to be interdicted, in the same manner as in other cases. It is not sufficient for the attorney appointed to defend him, to accept service.

A judgment of interdiction, rendered on *ex parte* testimony, is erroneous, and will be reversed on appeal.

The law requires that the person intended to be interdicted should be notified of the suit, and have the opportunity to employ his own counsel, before any is appointed by the judge.

This is a suit for the interdiction of the defendant, who is alleged to be subject to a habitual state of madness or insanity, from his childhood, and rendered incapable of taking care of his person, or of administering his estate, which should be administered by a curator after interdiction. That he is a joint heir with his sister, wife of Martial Sorel, of his father and mother both deceased, inheriting a large property, consisting of lands, sugar plantation and slaves; situated in the Parish of St. Mary, and by reason of his well known imbecility, is wholly incapable of taking care of it. The petitioner, prays the court to summon physicians, and other skillful persons, well acquainted with the said Charles Frederick Pelerin, to be interrogated, and to establish his insanity, and that counsel, learned in the law, be also appointed to represent him, and after hearing counsel, and full proof being made, that judgment of interdiction be pronounced.

William C. Dwight, Esq., was appointed attorney and

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counsellor, to represent the defendant; who accepted service of the petition.

The attorney then pleaded a general denial; and that the plaintiff be held to strict proof. That allowing what is alleged to be true, it does not follow that judgment of interdiction ought to be pronounced in this case; and that if more good would result from a contrary course, the defendant should be let alone. He prays for general relief.

The petition and answer, are marked "filed," by the parish judge.

The parties proceeded to take testimony in this case, in the office of the parish judge.

It was clearly shown, that the defendant was born an idiot, and subject to epileptic fits. He is totally incapable of taking care of his person, or to take care and administer his property; and is also destitute of the faculty of speech, constantly requiring to be attended by a nurse, and cannot even change his clothes, or feed himself.

From the evidence, the judge was satisfied of the idiocy, mental alienation, and bodily infirmities of the defendant, so as to require his interdiction. Judgment of interdiction was accordingly rendered.

The plaintiff then presented his petition, representing that the defendant was a resident and owner of large property in the parish of St. Mary, and that it was necessary that a curator be appointed to take care of his person and property, during the pendency of the suit for interdiction. He prays, that a family council be convoked, to deliberate touching the interests of said defendant, and that by the consent and advice, of said family meeting, some suitable person be appointed curator to his person and estate, and authorized to appear for and defend him in all suits at law now pending, in which his interests are involved; and to institute all suits necessary to protect and secure his property; and, that said curator have charge of his person and estate, and represent him in all civil acts.

The defendant, by his counsel, prayed and obtained an appeal from the judgment of interdiction.

Pending the appeal, C. Olivier, senr., was appointed administrator, *pro tempore*, of the defendant's property; and the plaintiff appointed to take care of his person.

Gibbons, for the plaintiff, submitted the case, urging the affirmance of the judgment.

Dwight, for the defendant, urged various objections to the proceedings and judgment, and that it should be reversed.

Garland, J., delivered the opinion of the court.

The plaintiff, in a petition addressed "to the honorable the judge of the parish of St. Mary and State of Louisiana," states, that he is a relative of Charles Frederick Pelerin, who is subject to a habitual state of madness or insanity, and has been so from childhood to the present time, which is notorious and visible to all who see or converse with him. That the said Charles is now arrived at the age of majority, and is utterly incapable of administering his property or taking care of his person. That he is a joint heir with his sister, to a large estate in the aforesaid parish, consisting of land, slaves, and moveable property, of great value. The plantiff, therefore, prays that counsel may be appointed to represent and defend said Charles Frederick; that physicians, and other competent persons, who know the said Charles, may be cited and examined to establish the habitual insanity; that a judgment of interdiction be pronounced against him, and he declared incapable of taking charge of his person, or administering his estate.

After the filing of this petition, with "Edward Pecat, clerk," but of what court, he does not inform us; the *parish judge* appointed counsel to represent the said Charles F. Pellerin, who accepted service of the petition, "to have the same effect and force, as if served on me, by the sheriff or coroner." A few days after this acceptance, the attorney filed with the *parish judge*, an application to delay his decision for two weeks, and that time be given him to answer. This paper states the case, as pending in the Court of Probates. What

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order was made on it, the record does not show; but it is probable the delay was granted, as fifteen days after, to wit, on the 18th of April, 1840, the aforesaid attorney filed, with the *parish judge*, an answer to the petition, and in it he says, the suit is in the *Parish Court*. On the same day the Court of Probates proceeded to try the cause, but took the testimony "in office, by the parish judge, of the parish of St. Mary," as appears. The counsel for the appellant states, that the cause was tried in open court, the witnesses came before it and testified; but he says, he never, as the attorney of defendant, saw the affidavits taken by the judge, "in his office," until he saw them in the record, and never consented to receive any affidavit in the case. He further states, that the affidavits state correctly the testimony as given, as nearly as he can now recollect it. How the facts are, we can only judge from the record, and this appears not very regular; but there are more important points on which the case must be decided. On the 23d of April, 1840, the Court of Probates decided the cause, and gave a judgment of interdiction against the defendant, from which he appealed. On the evidence, as it appears in the record, we are not prepared to say the judge erred.

But the questions involved in this case are not trivial. The proposition is to deprive a human being, under the protection of the law, of the administration of his property, and to place his person under the control of another, on the ground that he is incapable of administering the one, or taking care of the other. In the present case, it may be, the insanity is so notorious and clear, as to seem a justification for disregarding the ordinary forms of the law, in having it declared; but, we must remember, that rules established in this case may, in a short time, be brought to operate in one more questionable, and great injury may be done, by sanctioning a disregard or omission of the provisions of the law.

The Probate Court is the proper tribunal to institute actions for the interdiction of insane persons. *Louisiana Code, article* 385; *Code of Practice, article* 924; 5 *Martin, N. S.*, 136. The petition is addressed to the parish judge, without designating

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Suits for the interdiction of idiots, or insane persons, must be brought in the *Probate Court*, and all the proceedings had there. The *Parish Court*, although it be the same judge, is without jurisdiction, *ratione materiæ*, to try such cases.

It is necessary that the parish judge should designate, in all his proceedings, the capacity in which he acts; and the proceedings of the Probate court must be conducted and kept distinct from those of the Parish Court.

what court he presides over. It is left doubtful, and even the parties and judge afterwards seemed in doubt, as to the tribunal in which the suit was pending. Sometimes it was in the Parish Court, and then in the Court of Probates; we cannot very well understand which tribunal the plaintiff intended to select. The parish judge is properly the presiding officer of the Parish Court, and ex-officio judge of the Court of Probates; and if we were to draw an inference, from the manner he is addressed in the petition, it would be in favor of the supposition, that his authority was invoked in the former capacity. If so, the court was without jurisdiction, *ratione materiæ*, and the suit must be dismissed. The parish judge exercises different and important powers under our law, and it is very desirable that it should be known in what capacity they are called to act, as well as that in which they do act.

By an act of the legislature, passed in 1836, the clerks of the District Courts, in the fifth judicial district, are ex-officio clerks of the Courts of Probate, in their respective parishes, and are properly the keepers of the records of these courts; yet it seems the application for time to answer, made by the counsel for the defendant, and the answer when presented, were filed by the parish judge, and it is fair to presume, he filed them in the office over which he had control. If an answer should be presented to a district judge, and endorsed as filed by him, no one would suppose *that* a filing with the clerk. We will not say that this irregularity is sufficient to vitiate the proceedings in this case, as there is another more formidable.

In a suit for interdiction, service of petition and citation must be made on the person sought to be interdicted, in the same manner, as in other cases. It is not sufficient for the attorney appointed to defend him, to accept service.

By reference to the record it is evident, that the party sought to be interdicted was never notified of this suit; no citation, or copy of the petition was ever served on him, and he never authorized the attorney to accept a service for him. It may be said, there is no use in serving a copy of the petition on the defendant, as he is insane; but that is assuming as a fact, the issue that is to be tried, which the law does not permit a judge to decide, except upon the clearest evidence. Perhaps in this case no good might result from a notification of the proceedings, but in some other it might be of the

utmost importance. The judicial history of our state is not without examples of ineffectual attempts to interdict individuals, and cases of this kind may again arise. This court has decided in the case of *Stafford* vs. *Stafford*, 1 *Martin, N. S.*, 551, that a judgment of interdiction cannot be rendered on *ex parte* testimony, and that the person sought to be interdicted, must be notified. That case is a striking illustration of the importance of the rule we now lay down. The party sought to be interdicted, was not informed of the proceeding against her, and the inferior court rendered a judgment of interdiction; she discovered it, took an appeal, and reversed the judgment.

A judgment of interdiction rendered as *ex parte* testimony, is erroneous, and will be reversed on appeal.

It will, no doubt, be said in this case, that the judge appointed counsel to represent the defendant. We think the article 384, of the code under which that was done, has been misapprehended. It says, the judge shall pronounce on the case, "after having heard the counsel of the person, whose interdiction is prayed for; whom it shall be the duty of the judge to name, if one be not already named by the party." It is evidently the intention of the law, that the party should have an opportunity to employ such counsel as he liked, and to enable him to do so, he ought to be notified. It is alleged, that Pellerin is over twenty-one years of age; and it is sought not only to deprive him of the control of his property and person, but to hold him up to the world as an idiot or a maniac, without his ever having any notification of it. Such a doctrine, would put many eccentric but sensible men, completely at the mercy of any one, who, through malice or error, might commence proceedings to interdict them.

The law requires, that the person intended to be interdicted should be notified of the suit, and have the opportunity to employ his own counsel, before any is appointed by the judge.

The authority conferred on this court, by the article 389, of the code, and the seriousness of the case, has induced us to scrutinize it closely, and the result is, a conviction that the whole proceedings ought to be set aside.

It is, therefore, ordered, that the judgment of the Court of Probates be reversed and annulled, and the suit dismissed, at the costs of the plaintiff, in both courts.

PARKER *vs.* BRASHAER & BARR.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, FOR THE PARISH OF ST. MARY, THE JUDGE OF THE SIXTH PRESIDING.

Where the deposition of a witness is not annexed, or fastened to the commission and process verbal, but is enclosed with them in an envelope, sealed and directed to the clerk, it is sufficient.

A defendant cannot avail himself of an error in the name of his co-defendant, in a joint judgment against them.

A judgment against partners in a sugar estate, must in its form be *joint*, and against each one, separately, for his proportion.

This is an action on account, against W. Brashear, and Robert R. Barr, for machinery, and delivered to them, to be used on their sugar estate in Attakapas.

The defendants pleaded a general denial, and averred that four boxes of the machinery was ordered according to a model furnished, which was not followed, and in consequence the machinery was rendered useless, not fitting the works for which they were intended. The defendants pray for experts to examine the machinery and model, and report under the directions of the court. Experts were appointed accordingly.

The four boxes for friction rollers were charged at five hundred dollars, the balance made the entire bill six hundred and sixty-four dollars.

A witness was examined, for defendants, who made the model for the boxes, which were intended for the necks of the pressing cylinders of the sugar mill, who says, he carefully examined them, and that they are not made according to the model; but he does not know whether the model was furnished to the plaintiff or not.

On the trial the plaintiff's counsel offered the deposition of a witness to prove his account. It was objected to, on the ground that neither the process verbal, or the deposition or answers of the witness to the interrogatories, were *an-*

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nexed or attached to the commission. It, however, appeared that all of them were inclosed in one envelope, directed to the clerk of the court. The objection was overruled, and the deposition read, and a bill of exceptions was taken.

There was judgment against Brashear, and the legal representatives of Robert *S.* Barr, instead of Robert *R.* Barr, (who had died during the suit) in *solido* for the sum claimed, and the defendant, Brashear, alone appealed.

Maskell, for the plaintiff, urged the affirmance of the judgment.

Dwight, for the appellant, contended that the judgment was erroneously entered up, and must be reversed. The defendant was not liable for more than his virile portion.

2. There was error in relation to Barr. No such person as Robert *S.* Barr, being known in the suit.

Martin, J., delivered the opinion of the court.

The plaintiff seeks payment for sundry articles of machinery, made in his iron foundry for the defendants. The latter pleaded the general issue, and that the machinery was not made according to a model given the plaintiff, and was otherwise defective.

During the pendency of the suit, defendant, Barr, died; and there was judgment against the defendant Brashear, and the representatives of Barr. Brashear alone appealed.

Our attention is first arrested by a bill of exception, taken to the reading of a deposition, on the ground that the magistrate who received it, did not annex it to the process verbal, the commission and the interrogatories, as is required by law. *Code of Practice, article* 433.

Where the deposition of a witness is not annexed, or fastened to the commission and process verbal, but is inclosed with them in an envelope, sealed and directed to the clerk, it is sufficient.

It does not appear to us the court erred in receiving the deposition. The magistrate inclosed it with the commission, interrogatories and process verbal, in an envelope, sealed with his seal, and directed to the clerk of the court. This is sufficient to authorize the deposition to be read in evidence.

The delivery of the articles charged in the plaintiff's bill, was proved; but there is no evidence of any model or direction being given to the plaintiff by the defendants, as averred by them.

The judgment was rendered against Brashear, and the representatives of Robert *S.* Barr, when the deceased was called Robert *R.* Barr, and his name is thus stated in the petition. His representatives have not appealed. The error appears to be a *lapsus calami*, of which Brashear, who is the only appellant, cannot avail himself.

A defendant cannot avail himself of an error in the name of his co-defendant in a joint judgment against them.

The judgment should be a joint one; the defendants not being stated, and not appearing, to be commercial partners, but partners in a sugar estate, Brashear is only liable for one-half; and the liability of the representatives of the other defendant, is a matter which does not concern him. The court, however, erred in the form of its judgment. The Louisiana Code requires, that "in a suit on a joint obligation, judgment must be rendered against each defendant, separately, for his proportion." *Articles* 1081, 2844.

A judgment against partners in a sugar estate, must in its form be *joint*, and against each one eparately for his proportion.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, so far it relates to the defendant Brashear only, the other defendant not being before us; and proceeding to give such a judgment as, in our opinion, ought to have been given in the court below, it is ordered, adjudged and decreed, that the plaintiff recover of the defendant Brashear, the sum of three hundred and seventeen dollars, and thirty-one cents, with costs in the court below; those of the appeal be borne by the plaintiff and appellee.

PARMELE AND BAKER *vs.* BRASHEAR.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, FOR THE PARISH OF ST. MARY, JUDGE LEWIS, THEN OF THE DISTRICT, PRESIDING.

In a suit on a curator's bond against the surety, he is only liable for the moneys which come into the hands of the curator after signing the bond, and for the debts which are unpaid, from a failure to pay over the funds during that time.

The condition of a curator's bond being, that he will faithfully administer and perform the duties of his office, a failure to pay over money when ordered, is a breach of the condition, and the creditor has his remedy on the bond against the surety.

This is an action against the surety in a curator's bond. The plaintiffs allege that in December, 1834, they obtained a judgment against the curator of the estate of William S. Barr, deceased, for three hundred and sixty-seven dollars, with interest. That on the 30th of June, of that year, Robert B. Brashear, obtained a prolongation of the curatorship of said Barr's estate, with W. Brashear as his surety. They further urge that the condition of the bond is broken, and the bond forfeited, in consequence of the failure of the curator to pay them the amount of their demand or judgment, notwithstanding he has collected and received funds of the estate sufficient. That he has neglected and failed to administer the estate faithfully, and has, on the contrary, converted the funds to his own use. They pray for judgment on the bond for the amount of their debt.

The defendant excepted to the plaintiffs action and averred it could not be maintained until the estate was definitively settled, and a final tableau of distribution filed. This exception was sustained, and an appeal taken from the judgment rendered therein. *See* 11 *Louisiana Reports*, 329.

On the merits, the defendant denied generally and averred that there was not sufficient funds to pay the debts, and that he was not liable on his bond, because there was no mal-administration.

On the return of the case from the Supreme Court, it was

tried on the merits. It appeared the curator had been reappointed and given as many as three bonds; and that the defendant could only be liable in this suit on the last bond.

The district judge was, however, of opinion, that the suit was premature, and that no recovery could be had on the bond until the final administration of the estate, and final tableau filed. There was judgment for the defendant, and the plaintiffs appealed.

Splane, for the plaintiffs.

Dwight, for the defendant.

Martin, J., delivered the opinion of the court.

This case was before us at a former term, on an exception which was sustained by the District Court, and which this court overruled, and remanded the case for trial on the merits. *See* 11 *Louisiana Reports*, 329.

There was judgment on the second trial for the defendant, and the plaintiffs have again appealed.

The defendant's principal in the bond, curator of the estate of William S. Barr, deceased, at the end of the first year of his curatorship, presented an account of his administration, in which he placed the plaintiffs as creditors, for the sum of three hundred and sixty dollars and fifty cents, and stated that their proportion of the funds collected, was forty dollars and ninety-four cents. This account was homologated; payment ordered accordingly, and the curatorship prolonged for another year. At the expiration of the second year, he presented another account, in which the plaintiffs were placed as creditors for the sum of three hundred and nineteen dollars and fifty cents, and their proportion of the funds on hand put down at one hundred and eighty dollars and fifty-three cents, and payment ordered accordingly. There was a prolongation of the curatorship for the third year, (1834,) with the present defendant as surety. The bond bears date the 13th of June, 1834. On the 11th of December, in the same year, the plaintiffs claim was liquidated by a judgment for the sum of three hundred and sixty-seven

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In a suit on a curator's bond against the surety, he is only liable for the moneys which came into the hands of the curator after signing the bond, and for the debts which are unpaid from a failure to pay over the funds during this time.

The condition of a curator's bond being, that he will faithfully administer, and perform the duties of his office, a failure to pay over money when ordered, is a breach of the condition, and the creditor has his remedy on the bond against the surety.

dollars, with interest. The present suit is instituted for the amount of this judgment, on the last mentioned bond, against the surety therein.

The present defendant was surety on the original bond, and another person on the first prolongation or second bond.

With regard to the moneys which the principal had received, before the date of the bond sued on, the present defendant is clearly not liable. There is no evidence that any money came into his hands after that time. The plaintiffs, therefore, have no claim for the non-payment of money. But the condition of the bond is, that the curator "shall well and truly administer upon the estate, and faithfully execute and perform the duties required of him by law." The neglect to administer faithfully and perform these duties is most certainly a breach of the condition of the bond. The solvency of the estate is stated by the curator, and appears further from the inventory and statement of active and passive debts filed by him. The prolongation of the curatorship is conclusive evidence that part of the duties of the curator remained to be performed. It is not shown that any of them have been attempted to be performed since that time. The condition of the bond is therefore broken.

It remains to inquire into the amount of the plaintiffs' claim. It has been liquidated by the judgment for the full amount of the original account, in the sum of three hundred and sixty-seven dollars. The curator had received funds of the estate out of which he had been directed to pay two hundred and twenty-one dollars and forty-seven cents, as the proportion due to the plaintiffs, before the date of the bond sued on. For this, if not paid, his remedy is on the two first bonds. The balance to wit, the sum of one hundred and forty-five dollars and fifty-three cents, forms the amount of his claim in the present suit.

It has been contended that the plaintiffs ought first to have provoked the filing of an account and tableau of distribution by the curator. This would have been very requisite if they had sought a recovery from the estate administered by him. But the sole object of the present suit is to recover

from the surety of the curator, personally and out of his private property, the damages which they have sustained by the breach of the condition of the bond. *See the case of Rison* vs. *Young and Turnbull*, 7 *Martin, N. S.*, 294.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled and aversed; and it is further ordered, adjudged and decreed, that the plaintiffs do recover from the defendant, Walter Brashear, the sum of one hundred and forty-five dollars and fifty-three cents, with legal interest from the first of June, 1832, until paid, with costs in both courts.

COLLINS *vs.* MOORE AND PRESCOTT.*

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, FOR THE PARISH OF ST. LANDRY, THE JUDGE OF THE SIXTH PRESIDING.

Where the plaintiff holds by two titles, and the premises are sold by the sheriff under execution against him, and he receives the balance, after satisfying the judgment, he cannot set up a claim to the same property under the other title, although the sheriff describes the sale to be of the youngest of the two titles.

This is an action to recover twelve arpents of land by forty in depth, situated on the east side of the Bayou Courtableau, in the parish of St. Landry.

The plaintiff, William C. Collins, alleges that his father, John Collins, acquired title to the above tract of land by purchase from one Charles Vigé, who by several mesne conveyances acquired it from the original grantee of the Spanish government. He further shows that his father is dead, and he is the only son and heir; and has inherited the same. But that in 1830, the defendants took possession and continue to occupy said land, and have committed great waste.

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* When the case was taken up, Judge SIMON left the bench for the remainder of the term. The court then consisted of Judges MARTIN, MORPHY and GARLAND.

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He prays that his title may be declared the best, and the possession delivered to him, &c.

The defendants plead a general denial; and aver they hold the land by a good title, purchased at sheriff's sale, under a judgment and execution against the plaintiff, which sale was regularly made and is valid. They pray that the defendants' demand be rejected.

The plaintiff sets up a different title, as he contends, to the land, from that under which it was sold by the sheriff, and which is an older and a better title.

There was judgment decreeing the defendants to be the legal possessors and owners of the land in controversy, and the plaintiff appealed.

Linton, for the plaintiff, submitted the case.

T. H. Lewis, for defendant.

Garland, J., delivered the opinion of the court.

The plaintiff commenced this suit to recover of the defendants a tract of land containing twelve arpents front by forty in depth, situated on the east side of the Bayou Courtableau, in the parish of St. Landry, which he alleges was granted by the Spanish government, and by several conveyances from the grantee, came into the possession of John Collins, his father, from whom he inherited it. The defendants do not deny that the plaintiff had a title to the land in question, but allege they are the owners of all his right to it; having purchased the same at one or more sales made by the sheriff of the parish of St. Landry, under several executions issued on judgments obtained against the plaintiff in 1829 and 1830. No irregularity or defect in these sales, is alleged or proved, and the sheriff in his deeds, says, he sells and transfers "all the right, title, interest or demand, which the said William C. Collins has or had to said lands, or any part thereof at any time."

Where the plaintiff holds by two titles and the premises are sold by the sheriff under execution against him, and he receives the balance, after satisfying the judgment, he cannot set up a claim to the same property, under the other title, although the sheriff describes the sale to be of the youngest of the two titles.

So far as the facts can be gathered from the record, it appears the plaintiff had two titles, which cover the same piece

of land, but as the sheriff in describing it in his sale, only mentioned one of the original grants and that the youngest, he wishes to recover back the land under the oldest grant, notwithstanding he has ratified the sales by receiving a balance from the sheriff, after the payment of all the executions; and is also bound to warrant the title of the defendants. We are unable to see the slightest foundation for the claim advanced, and, therefore, affirm the judgment of the District Court, with costs.

WILLIAMS *vs.* BRASHEAR.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, FOR THE PARISH OF ST. MARY, THE JUDGE THEREOF PRESIDING.

In an application for a new trial, on the ground of newly discovered evidence, in the absence of the party, the attorney who conducts the suit is competent to make the necessary affidavit, when the facts are within his knowledge.

So, in an action against the drawer of a bill, where the attorney swears that since the trial he has discovered a certain person who will prove that the defendant had sufficient funds in the hands of the acceptors to pay the bill, it is good grounds for a new trial.

This is an action against the drawer of a bill of exchange.

The defendant, at New-Orleans, 12th of May, 1834, drew his draft for one thousand seven hundred and twenty-three dollars and seventy-four cents, on Bemiss, Brashear & Co., of Franklin, in the parish of St. Mary, payable the 1st of November following, to the order of John B. Bemiss, and by him endorsed. The draft or bill was duly accepted by the drawees, and protested for non-payment; *but no notice was given to the drawer.*

The plaintiff alleges that the said bill was protested for non-payment; that the defendant had no funds in the hands of the drawees from the date to the maturity and protest of said bill, and that he has since promised to pay the same.

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The defendant pleaded a general denial; he denies specially that he had any notice of the protest and dishonor of the bill. That he had sufficient funds, at the time of protest, in the hands of the drawees, to pay the amount of the said bill. He prays that the plaintiff's demand be rejected. On these pleadings and issues the parties went to trial. The evidence of two book-keepers of the firm of Bemiss, Brashear & Co., shows that from the beginning of the year 1834, up to the 1st of November, when the bill sued on became due, the defendant had, according to the books, *no funds* in the hands of the drawees; that, on the contrary, there was a balance against him. There was general dealings between defendant and the drawees. It appeared, however, that this bill was not entered on the books as having been accepted by the firm of Bemiss, Brashear & Co., and that the acceptance was in the hand-writing of Bemiss, the leading member of the firm, but was made in New-Orleans. There was no notice of protest shown to have been given to the defendant, and none was given.

On the whole evidence adduced, there was judgment for the amount of the bill sued on. The defendant's counsel moved for a new trial, on the grounds of newly discovered evidence, and in the absence of his client offered his own affidavit of the fact. He states that every effort was used to procure the necessary testimony. That since the trial it came accidentally to his knowledge, in the absence of the defendant, that one John Lay, can and will prove, that the drawees and acceptors of the bill had funds belonging to the defendant, sufficient to pay it, at the time it became due. That at the time of the acceptance, the defendant had sold his crop of molasses to the acceptors for a very large sum to be paid in the fall, by the acceptance of drafts to become due in the fall of 1834.

The motion for a new trial was overruled, and the defendant appealed.

Morse, for the plaintiff, insisted on the affirmance of the judgment. The motion for a new trial was properly

overruled. The attorney was incompetent to make the affidavit, and it is not shown that proper diligence was used to get the testimony alleged to have been discovered, by the attorney, since the trial. This witness must have been known to the defendant, and his testimony, with proper diligence, might have been had. *Code of Practice*, 561. 6 *Martin, N. S.*, 327. 10 *Martin*, 81. 10 *Louisiana Reports*, 371.

2. It is fully proved that the defendant had no funds in the hands of the acceptors, at any time from the drawing to the maturity of this bill; and he was not entitled to notice. 3 *Martin, N. S.*, 147. *Chitty on Bills.*

Dwight, for the defendant, submitted the case on an asignment of errors of fact and law.

That he had no notice of the dishonor of the bill sued on, and none has been shown; consequently he is not liable.

2. That acceptance by drawees is full and complete proof that he had funds in their hands, and that the failure of the drawees books to show that fact, can have no effect against a positive presumption of law; especially when, as in this case, the failure to charge the defendant with this draft on acceptance, shows that the books were incorrectly kept.

Martin, J., delivered the opinion of the court.

We have not attended to the merits of this case, it appearing to us that the District Court erred in refusing the new trial.

The defendant being absent, his attorney made a formal affidavit, stating newly discovered evidence, which came accidentally to his knowledge since the trial, to wit: that one John Lay, is able to prove that the defendant, who *is sued on a bill of exchange*, at the maturity of the bill, had sufficient funds for its payment in the hands of the acceptors. The affidavit contains all the averments requisite to sustain an application for a new trial, in a case like the present. If there ever was any doubt that, in the absence of the client, the attorney who conducts the suit may make his affidavit of facts immediately in his own knowledge, that doubt has

In an application for a new trial, on the ground of newly discovered evidence, in the absence of the party, the attorney who conducts the suit is competent to make the necessary affidavit, when the facts are within his knowledge.

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been removed by an act of the legislature, approved March 20th, 1839, *section*, 16; which provides "that in all cases where by any provision of the Code [of Practice] an oath of a party is required, it may (in the *absence of the party*) be made by his agent or *attorney*; and in such case it shall be sufficient for the agent or attorney to swear to the best of his knowledge and belief."

So, in an action against the drawer of a bill, when the attorney swears that since the trial he has discoverd a certain person who will prove that the defendant had sufficient funds in the hands of the acceptors to pay the bill, it is good grounds for a new trial.

The law never requires what is impossible. A motion for a new trial must be made within three days after the rendition of the judgment. If the party be absent, he must be without remedy, if the affidavit of evidence discovered within these three days cannot be made by his agent or attorney who made the discovery. Necessity justifies whatever it commands. He who has been convicted of perjury may make the affidavit necessary to obtain a continuance, new trial or injunction, in his own case, so much does the law abhor a failure of justice.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, and the case remanded for a new trial; the plaintiff and appellee paying the costs of appeal.

LE BLANC *vs.* BARAS'S HEIRS.

APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH OF ST MARTIN.

Parole evidence is *inadmissible* to show that all the formalities of a nuncupative will by *authentic* act, have been fulfilled. It must make full proof on its face.

Where there are but *three* witnesses to a will by authentic act, express mention must be made in the will, that they *reside* in the place where the will is executed.

The formalities required to be pursued in a will by *authentic act*, express mention must be made in the will itself of their fulfilment, on pain of nullity of the entire instrument.

The plaintiff, who is the widow of Julien Baras, deceased, presented his last will and testament for probate; and prayed that she be put in possession of all his estate, as instituted heir, according to the provisions of said will.

The heirs at law, of the deceased, intervened and made opposition to the probate of the will, and to its being ordered to be executed; alleging its nullity on various grounds.

1. It does not make express mention of the residence of the witnesses.

2. There is no express mention, in the will, that it was read to the testator in presence of the witnesses; that in fact it was not so read as the law requires.

3. The will does not show that all the legal formalities were fulfilled at one time, without interruption and turning aside to other acts.

4. That said will is informal, and does not contain any of the requisites of law. They pray that it be declared null and set aside, and that the plaintiff pay costs.

The following clause in the will, is the one upon which the whole case turns:

"*Pardevant Antoine Bruno, notaire public dans et pour la paroisse St. Martin, soussigné et en presence des sieurs John H. Thomas, Charles Fagot et Therence Boutté, tous trois temoins requis en conformité de le loi est comparu Mr. Julien Baras, habitant cultivatéur et proprietaire domicilié en cette paroisse.*"

On the trial, the plaintiff offered parole evidence to prove that the three witnesses to the will, all resided in the parish or place of the testator's domicil, which was objected to, and excluded by the court.

There was judgment sustaining the will, and the defendants appealed.

Morse, for the plaintiff.

Voorhies, for defendant.

Morphy, J. delivered the opinion of the court.

Marie Le Blanc, widow of Julien Baras, having presented, for probate, the last will and testament of her late husband,

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the heirs at law, of the deceased, opposed the recording and execution of said will, and prayed that it should be set aside and annulled, on the following grounds, to wit:

That the said testament does not contain any express mention of the residence of the witnesses, in whose presence it appears to have been received.

2. That it has not been read to the testator in presence of the witnesses, as there is no express mention of the fact.

3. That the will does not show that all the legal formalities were fulfilled at one time, without interruption, and without turning aside to other acts.

The opinion, which we feel ourselves constrained to express on the first ground of nullity, urged by the heirs of the deceased, will make it unnecessary to examine the two others.

Parole evidence is *inadmissible* to show that all the formalities of a nuncupative will by *authentic* act, have been fulfilled. It must make full proof on its face.

A nuncupative will by public act, makes full proof of itself. *Louisiana Code, article* 1640. It must, therefore, bear on its face the evidence that all the formalities required by law for its validity, have been thereby complied with, and the fulfilment of those formalities, when not apparent from the instrument itself, cannot be established by testimony. If it could, the will would no longer be an authentic act.

The *Louisiana Code, article* 1571, provides that "the nuncupative testaments by public act, must be received by a notary public, in presence of three witnesses, *residing* in the place where the will is executed, or of five witnesses, *not residing* in the place.

"This testament must be dictated by the testator, and written by the notary as dictated.

"It must then be read to the testator, *in presence* of the witnesses. Express mention is made of the whole, observing that all these formalities must be fulfilled at one time, without interruption, and without turning aside to other acts."

Article 1588, says, "the formalities to which testaments are subject by the provisions of the present section, must be observed; otherwise the testaments are null and void."

This will, in its caption, states "*en presence des sieurs John H. Thomas, Charles Fagot et Therence Boutté, tous trois temoins requis en conformité de la loi est comparu,*" &c. It does not

appear from this passage, or any other in the instrument before us, that the requirement of the law, in relative to *the residence* of these witnesses, has been complied with. The probate judge, when called upon to order the execution of this will, had no evidence to satisfy him, that all those things which are required, to give validity to the will, had been done. The residence of the witnesses not being *mentioned*, it did not appear, from the will, that it had been received in presence of a sufficient number of witnesses. It has been contended, that from the words, "*en conformité de la loi*," the inference might be drawn, that the witnesses were such as the law requires. Such an inference, if admitted to supply the mention of this fact, might be extended to every one of the formalities prescribed. Their absolute omission, might with as much reason, be said to be supplied by an assertion of the notary, that he executed the will according to law. The Code not only requires these formalities to be pursued, but provides that express mention of their fulfilment must be made in the will itself, when executed before a notary public. It is on a strict compliance alone with these formalities, that the law is willing to recognize the testament as legal, and to suffer the established order of succession to yield to the will of the testator. When a case of this kind arises, courts of justice can do nothing else, but inquire whether they have been pursued. The objection taken by the heirs at law, in this respect, appears to us fatal.

Where there are but *three* witnesses to a will by *authentic* act, express mention must be made in the will, that they reside in the place where the will is executed.

The formalities required to be pursued in a will by *authentic act*, express mention must be made in the will itself of their fulfilment, on pain of nullity of the entire instrument.

It is, therefore, ordered, adjudged and decreed, that the judgment of the court below, homologating the last will of Julien Baras, and ordering its execution be reversed; and that the said last will, be set aside and annulled, the appellee paying the costs in both courts.

MARSH AND MILLER *vs.* GONSOULIN.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, FOR THE PARISH OF ST. MARTIN, THE JUDGE OF THE SIXTH PRESIDING.

Where a purchaser of public lands offers to comply with the conditions of the law, and is prevented by the government not performing the obligations imposed on it, he is not to suffer or lose his rights on this account.

So, where the government refused to receive the money from a pre-emptor, who had proved up his settlement right under the act of congress, passed the 29th May, 1830, because the land was not surveyed, and a plat returned to the land office; and in the mean time, the front proprietors entered, *and paid the* government for the same land, under the act of 15th June, 1832, giving the owner of land fronting on water courses, "a preference, in becoming the purchaser of any vacant land back of his own tract." *Held*, that the pre-emptor having offered to comply with all the conditions of the law on his part, is entitled to hold the land.

This is an action to evict the defendant, and recover from him one hundred and sixty acres of land, which he had entered at the land office, and proved up as a settlement right.

The plaintiffs being owners of front tracts of land, on the bayou Teche, in 1836, entered the back lands lying adjacent and in the rear of their fronts, under the act of congress, passed the 15th June, 1832, giving to front proprietors the right to purchase the rear, or back concessions, by preference or right of pre-emption. They paid to the government to the amount of the purchase money, on application to the register and receiver of public moneys, and obtained the government's receipt therefor.

The defendant had, in the mean time, settled on this back concession, and claimed to hold one hundred and sixty acres under a settlement and pre-emption right, conferred by the act of congress, passed the 29th of May, 1830. He alleges, that he has complied with all the requirements of said act, to entitle him to the ownership of said land. He prays that the plaintiff's demand be rejected.

Upon these issues and pleadings, the cause was tried.

It appeared in evidence, that the defendant settled on the *locus in quo*, in the spring of 1829, and after the passage of the pre-emption law of 1830, he went to the land office at Opelousas, and proved up his settlement right, under said act, but the officers of the United States, would not receive the money, because the lands on which this settlement was made, had not then been surveyed by the United States' surveyor, and a plat thereof returned to the land office. The defendant tendered the price, on proving up his claim. Before the land was surveyed, the act of 1832 was passed, giving to front proprietors, the right to enter their back concessions, which, in this case, embraced the defendant's settlement. Their entry covers his claim, and the price was received by the government.

There was judgment for the defendant, and the plaintiffs appealed.

Morse, for the plaintiffs.

T. H. Lewis, for the defendant.

Garland J., delivered the opinion of the court.

The plaintiffs claim the ownership of a tract of land in the parish of St. Martin, which is in the possession of the defendant, who has inhabited and cultivated it, since the spring of the year 1829.

The plaintiffs derive their title from the United States, under an act of congress, approved the 15th of June, 1832, which gives to the owner of the land fronting on a water course, "a preference in becoming the purchaser of any *vacant tract of land*, adjacent to, and back of his own tract," not exceeding in quantity the front tract. The provisions of this act, were extended to the 15th of June, 1836, and on the 7th of that month, the plaintiffs representing to the register and receiver, that the land in the rear of their tract, was *vacant*, entered the same and obtained a receipt, of the receiver of public moneys, for the money. The defendant claims the land under the provisions of an act of Congress,

giving pre-emption rights to settlers, on the public lands, approved May 29th, 1830, which says, "every settler or occupant of the public lands, prior to the passage of this act, who is now in possession and cultivated any part thereof, in the year 1829, shall be, and is hereby authorized to enter with the register of the land office, any quantity of land, not exceeding a quarter section, at the minimum price, upon making proof of such settlement and cultivation within one year. The defendant was settled on a piece of public land, in the rear of the plaintiff's tract. On the 12th of May, 1831, he made application to the register and receiver, at Opelousas, to purchase the land on which he was settled, and made the proof required to establish his occupancy and cultivation. The register and receiver, were satisfied with the evidence, and endorsed the foot of his application, "we allow the claimant to make entry and purchase of the proper legal sub-division, which may be found to embrace the settlement set forth, and proven in the foregoing notice and testimony, with the right of complement according to law."

(Signed,) VALENTINE KING, Register.
BENJAMIN R. ROGERS, Receiver.

The aforesaid register, on the 23d of March, 1832, also gave the defendant a certificate, stating that he had been allowed to make an entry, and purchase the tract of land in question, in conformity with the act of congress, of May 29th, 1830. The defendant offered to pay for the land in May, 1831, when he made the application to purchase it, but was told, by the register his money could not be received, as the land had not been legally surveyed, and the township plat returned according to law, and they were forbidden, by instructions from the commissioner of the general land office, to receive money in such cases, but that if the money was paid in one year after the land was legally surveyed, and the plat returned, it would be sufficient, and the said instructions are in the record. On the 14th of July, 1832, congress, passed an act, supplementary to the act of 1830, in which it is expressly said, that in all cases, where a person was entitled to a pre-emption, under the act of 1830, but have not been ena-

MARSH & MILLER vs. GONSOULIN.

Where a purchaser of public lands offers to comply with the conditions of the law, and is prevented by the government not performing the obligations imposed on it, he is not to suffer or lose his rights on this account.

So, where the government refused to receive the money from a pre-emptor, who had proved up his settlement right under the act of congress, passed the 29th of May, 1830, because the land was not surveyed and a plat returned to the land office; and in the meantime the front proprietors entered *and paid the* government for the same land, under the act of 15th of June, 1832, giving the owner of land fronting on watercourses, "a preference in becoming the purchaser of any vacant land back of his own tract." *Held*, that the pre-emptor having offered to comply with all the conditions of the law on his part is entitled to hold the land.

bled to make their proof and entry, "in consequence of the public surveys not having been made and returned; then the said settlers or occupants may complete their entry, "within one year after the surveys are made." The survey has not yet been made and returned, but the defendant, in 1837, again offered to pay for the land, and the money was refused.

The act of May 29th, 1830, certainly authorized the defendant, to enter the land, and gave him a preference over all other persons. He did all in his power to comply with the conditions of the law, and was prevented from completing his purchase, by the United States not performing all the obligations imposed on them. It was the duty of the government to have the land surveyed, and the plat returned to the register's office. The defendant could not do it. He has complied with all the conditions of the law that were in his power, and as the other party has not complied with their obligations, it is not his fault, and he is not to suffer by it. It is to be observed, that the plaintiffs were authorized to purchase "any vacant tract of land," adjacent to their own tract, and it cannot be said the land in possession of defendant, was *vacant*. We have been referred to several decisions of the court, reported in 9 *Louisiana Reports*, 56. 10 *Louisiana Reports*, 159 and 11 *Louisiana Reports*, 322.

These decisions we think correct, but a material difference between those cases and the one under consideration, seems to have escaped the observation of the counsel for the appellants. The pre-emption rights in those cases, arose under the 5th section of an act of congress, relating to land titles in Louisiana, approved April 12th, 1814, which referred to an act, approved February 5th, 1813. *Land Laws, volume 1st*, 631, 653. Under those laws, the person claiming a right of pre-emption, in addition to the proof of occupancy and cultivation, was bound to pay in cash one-twentieth part of the purchase money, whether the land was surveyed or not. In none of the cases cited was the money paid. Suppose it had been paid, and the proof made in accordance to law, this court would probably not have decided as it did. It may be

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said no money was paid in this case, the answer is, none was required until the land was surveyed. The government can compel the defendant to pay as soon as it pleases, but until it does, he is not to suffer for the neglect. We therefore, think the court below, did not err in its judgment for the defendant, and affirm it with costs.

BREAU *vs.* LANDRY ET AT.

APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH OF ST. MARTIN.

Where the husband seeks to recover certain property as his part of the community, in his own right, from the heirs of his deceased wife, who claim it under her last will, although he may give to his suit, the form of an action of partition, yet it involves title, and the probate court is without jurisdiction.

This is a suit purporting to be an action of partition. The plaintiff as surviving husband, sues in his own right, and in behalf of two of his children by his deceased wife, Mathilde Broussard, alleges that a community of property existed between the spouses during marriage; among other things, there was a plantation and improvements, belonging to said community, at its dissolution, one-half of which belongs to him, and the other to the children and legal heirs of his deceased wife, which has never been partitioned among them. That Lise Landry, widow of Alexander Breau, one of said children, now wife of Gilbert Sourier, being an heir of Mathilde Broussard, have taken possession of the plantation and improvements without any legal right, and retain the same, in virtue of a pretended will of said Mathilde, whereby she bequeathed her property to her eight children. The plaintiff admits the will may be good, as regards one-half of said property, but that the other, belongs of right to him, as surviving partner of the community. A partition is prayed for according to law.

The defendants plead the general issue, and aver that the community property of the plaintiff and wife had been partitioned, and definitively settled between the plaintiff and the heirs; and that the property now claimed, had been set apart to Alexander Breau, one of the heirs of said Mathilde, and of which these defendants are now in the quiet and peaceable possession.

The answer sets up various other matters in defence, and avers that the plaintiff is without any cause of action; that this suit is vexatious, and intended to harass the defendants, by reason whereof, they claim five hundred dollars in damages.

Upon these issues and pleadings, the case was brought before the Court of Probates. The judge of the probate court, was of opinion, the issue between the parties involved questions of title, and that he had no jurisdiction of the case. There was judgment dismissing the suit for want of jurisdiction, and the plaintiff appealed.

Neveu, for the plaintiff, argued to show that this was clearly an action of partition among heirs, of the succession of Mathilde Broussard deceased, and that the Court of Probates has exclusive jurisdiction.

Voorhies, contra, insisted that the case involved questions of title, which could only be inquired into by the courts of general jurisdiction. The defendants claimed the property in their own right, as having been bequeathed to them by the deceased wife of the plaintiff. It had been partitioned, and they claimed under a title.

Morphy, J., delivered the opinion of the court.

The plaintiff is appellant from a judgment of the Court of Probates, of the parish of St. Martin, dismissing his action for want of jurisdiction. The petition charges, that at the death of Mathilde Broussard, the wife of Pierre Breau, the present plaintiff, all the property then existing, was community pro-

perty. That part of it consisted of a plantation of twelve arpents, on the Bayou Teche, with certain improvements made during the marriage; that since the death of Mathilde Broussard, her husband, Pierre Breau, has caused to be built on said land, out of his private funds, a cotton-gin house, and has purchased and employed ten thousand fencing *pieux*, in enclosing the greatest part of the plantation; that one-half of all said property belonged to Pierre Breau, and the other half to the heirs and legal representatives of his deceased wife; that Lise Landry, the widow of Alexander Breau, and tutrix of his children, and her present husband, Gilbert Sourier, have forcibly and unlawfully taken possession of said land, and the improvements; and do still retain the possession of the same, against the will and consent of the petitioner, in virtue of a pretended will and testament of the said Mathilde Broussard; whereby she bequeathed the said land and part of the improvements to her children, the defendants. That the said last will may be good, with regard to the share of the said Mathilde Boussard in the said plantation, but that it is without effect as to the share of said Pierre Breau, and that it is almost impracticable to divide the said land and improvements in kind without injury to the parties concerned; the petition then concludes with a prayer for a partition, &c. We think, that the judge below acted correctly in declining to take jurisdiction. Pierre Breau, does not claim, as one of the heirs of his wife, Mathilde Broussard, but he seeks to recover from them property belonging to him in his own right, and which his wife, as he alleges, unlawfully bequeathed to them. The form of a partition, which he has given to his action, cannot change the nature of his claim, which is clearly one for the recovery of property, alleged to be unjustly withheld from him. His ownership is not admitted by the defendants, who hold as absolute owners, under the will of their mother, and are in actual possession. The validity and strength of their title cannot be passed upon by the Court of Probates. 2 *Louisiana Reports*, 25, *Sharp* vs. *Knox*. As to the improvements alleged to have been made by Pierre Breau on the plantation, since the dissolution of the community,

Where the husband seeks to recover certain property as his part of the community, in his right, from the heirs of his deceased wife, who claim it under her last will, although he may give to his suit the form of an action of partition, yet it involves title, and the Probate Court is without jurisdiction.

they may entitle him to a claim against the heirs of his wife, in a court of ordinary jurisdiction, should they be declared the sole proprietors of the land.

It is, therefore, ordered, that the judgment of the court below be affirmed, with costs.

DELAHOUSSAYE *vs.* DUMARTRAIT.

ON A RE-HEARING.

The exception of *quæ temporalia sunt ad agendum, sunt perpetua ad excipiendum*, exists only in favor of the defendant in possession of the property, or right sought to be recovered.

So, where a person has delivered possession of property, or *ratified a sale, when a minor*, he cannot afterwards bring a petitory action, to compel the purchaser to produce his title, and then, by way *of exception*, ask for the rescission or nullity of the sale, when in fact he was barred by prescription from bringing a direct action of rescission or nullity.

This case comes up on a re-hearing. At the September term, 1832, of this court, holden at Opelousas, a judgment was rendered disallowing the defendant's plea of prescription, opposed to the plaintiff's demand. See 4 *Louisiana Reports*, 368.

The plaintiff had a judgment against B. Delahoussaye, (who had been his curator) obtained in 1827, with a legal mortgage on all his property which he owned at and since the 14th of October, 1814. He now seeks to enforce this mortgage against a tract of land, sold under execution, as the property of said Balthazar Delahoussaye, and purchased by the defendant in June, 1822. The defendant had made an exchange of this tract with one Leufroy Prevost, for another of the same value. On the 24th of March, 1823, the plaintiff, *then a minor*, executed an act of renunciation in favor of both Dumartrait and Prevost, of all his claim and right of

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mortgage against said land, and approving and ratifying said sale.

On the 26th of November, 1824, the plaintiff was of full age, and on the 19th of July, 1830, nearly six years afterwards, he brought his action to recover or subject this property to his legal mortgage against his curator.

The district judge, after hearing the case, was of opinion the plaintiff was completely barred from exercising his hypothecary action against the property in the possession of defendant, by prescription, more than four and five years having elapsed after he came of full age, before the institution of this suit.

There was judgment dismissing the suit, and quieting the defendant in the possession of the property. The plaintiff appealed.

[This cause was originally argued by *Mr. Brownson*, for the plaintiff, and by *Mr. Simon*, for the defendant. See 4 *Louisiana Reports*, 370. The case was decided in September, 1832, and printed in the Reports. A re-hearing was afterwards granted, although there was some uncertainty as to whether the time allowed in such cases had not expired. A consent rule was entered, and this case is now decided as if in the first instance. The former decision goes for nothing.]

The case was submitted at this term, by *Mr. T. H. Lewis*, for the plaintiff, and by *Mr. Voorhies*, for the defendant.

Morphy, J. delivered the opinion of the court.

This is an hypothecary action against property in the hands of the defendant, as a third possessor, and was brought to satisfy a judgment, obtained by the plaintiff, against Balthazar Delahoussaye, who was his curator, and to whom the land formerly belonged. The defence set up, is that, in a notarial act in which the plaintiff was assisted by his curator, he renounced his tacit mortgage on the premises; that although he was then a minor, he cannot now ask for the nullity or rescission of his renunciation, because he is barred by prescription; more than *five years* having elapsed between his coming of age and the institution of this suit.

The exception of *quæ temporalia sunt ad agendum, sunt perpetua, ad excipiendum*, exists only in favor of the defendant in possession of the property, or right sought to be recovered.

The plea of prescription was sustained below, and the plaintiff appealed.

It appears to us that the decision to be made, on the plea set up by the defendant, depends on a correct application of the rule *quæ temporalia sunt ad agendum; sunt perpetua ad excipiendum*, which is invoked by the plaintiff. If he is not entitled to its protection, his renunciation has become binding on him, as much so, as if he had ratified it after becoming of full age. This rule, which is derived from the Roman jurisprudence, has often been improperly applied, and made to cover direct demands under the name and form of exceptions. It is now, however, well understood to exist only in favor of a defendant in the possession or exercise of the property, right or position attempted to be taken from him. If for instance, a vendor is left in possession of property after a sale of it which might have been annulled on the score of lesion, he may remain silent as to this defect in the contract, and reserve to himself the right of pleading the nullity of the sale, by way of exception, whenever he shall be sued by the purchaser for the delivery of the property; until then he has no interest to bring a suit; he might consider the contract as a nullity, and believe that the purchaser will never call for its execution; hence the maxim, *posidenti non competit actio sed exceptio*. If on the contrary, such a vendor had delivered the property, and suffered the purchaser to remain in possession a length of time sufficient for the prescription of the action of rescission, he could not afterwards, by bringing a petitory action, thus compel the purchaser to produce his title, and then by way of exception, ask for its nullity or rescission.

So, where a person has delivered possession of property, or *ratified a sale, when a minor*, he cannot afterwards bring a petitory action to compel the purchaser to produce his title, and then, by way *of exception*, ask for the rescission or nullity of the sale, when in fact he was barred by prescription from bringing a direct action of rescission or nullity.

Such an extraordinary course, would evidently cover an attempt to evade the law, debarring him from the right of bringing a direct action of rescission. 7 *Toullier*, *No.* 602. So, in the present case, the exception invoked by the plaintiff in a suit brought by himself, would, if sustained, give him all the advantages he could derive from a direct action of nullity against his renunciation, had he brought it in due time. This cannot be. An exception has for its object to maintain the defendant in the situation he stands in, while an action aims

at obtaining a change of the *statu quo*. Here the person making the exception, is not contending to preserve his position, but to better it by avoiding a renunciation, the benefit of which has been enjoyed by the defendant, during a lapse of time sufficient, in law, to protect him against the effects of a direct action of nullity. The plaintiff must, therefore, be viewed in the light of one seeking indirectly to exercise an action of nullity, which is prescribed; and not as a defendant entitled to the benefit of the well known rule, *tamdiù durat exceptio quamdiù actio*; for no action has been brought against him, which gives rise to such exception. 2 *Troplong, verbo Prescription, No.* 832, *page* 410. 17 *Merlin's Repertoire du Jurisprudence, verbo Prescription, page* 441, 442.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

O'BRIEN'S HEIRS *vs.* SMITH.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, FOR THE PARISH OF ST. MARY, THE JUDGE OF THE SIXTH PRESIDING.

Where the evidence shows that the ancestor of the plaintiffs had sold and transferred his interest in a settlement right, or tract of land, five years before its confirmation by the government, although confirmed in his name, it enures to the benefit of the transferee, and the heirs of the original grantee cannot recover it.

This is an action for the possession of a tract of land, for damages, and for waste committed thereon. The plaintiffs allege they are owners, with a good title, of a tract of six hundred and forty acres, on the Bayou Teche, and that the defendant has entered thereon, and committed great waste. They pray judgment for damages, and to be quieted in their possession.

The defendant denies generally, and avers he holds the

land by a good title, and has been in possession under it for more than ten or twenty years. That he derives title to one half of said land, from M. Carroll, and the other, by a sale duly recorded, from John B. Bemus. He prays that these be cited in warranty, and that he have judgment in his favor.

The facts of the case are fully stated in the opinion of this court.

There was judgment rejecting the plaintiffs' claim, and quieting the defendant in the possession of the land claimed; and the plaintiffs appealed.

Splane, for plaintiffs, submitted the case with a brief explanation.

Dwight, for the defendant.

Garland, J., delivered the opinion of the court.

This is a petitory action, instituted by the plaintiffs, as heirs of Christopher O'Brien, deceased, to recover a tract of land, situated in the parish of St Mary, on the right bank of the Bayou Teche, or Atchafalaya, containing six hundred and forty acres, which they say was confirmed to them, in 1812, by the commissioners appointed to ascertain the rights of persons to lands, in the western district, in the territory of Orleans, by virtue of a "settlement and cultivation, on and prior to the 20th day of December, 1803, by said O'Brien, or those claiming under him, with the permission of the proper Spanish officer." This is a title arising under the 2d section of an act of congress, approved the 2d March, 1805, entitled, "an act for ascertaining and adjusting titles and claims to land, within the territory of Orleans, and district of Louisiana," and the 1st and 2d sections of an act supplementary thereto, approved, April 21st, 1806. See vol. 1st, laws relating to the public lands, 518, 532. The second section, of the first act gave to every person, or their legal representative, who was the head of a family or twenty-one years of age, who had settled on the public domain prior to the 20th

of December, 1803, with the permission of the proper Spanish officer, and according to the laws, usages and customs of the Spanish government, and who actually inhabited and cultivated the same on the day aforesaid, a right to a tract of land, not exceeding six hundred and forty acres; and there is a proviso to said section, which says, but one grant of this description shall be made to the settler, and further, that the donation shall not be made to any person who claims any other tract of land in the territory, by virtue of a French or Spanish grant. The object of the law is palpable. It was to give a home to such persons as had none before; and the ancestor of the plaintiffs having availed himself of its provisions, shows, beyond question, that he had no other land. If he had, and concealed it, the title now set up, was obtained improperly.

On the 26th day of June, 1807, the ancestor of the plaintiffs, sold to Thomas Berwick, all his right, title, claim and pretensions, to a certain piece or parcel of land, lying and being in the parish of Attakapas, situated on the south side of the Bayou Teche, adjoining the land now claimed by Talmadge Dunleavy, above, and extending downwards to the extent of said claim, which is six hundred and forty acres, arising on improvement, together with all improvements. This is the description as given in the deed, and by reference to the certificate of confirmation, it will be seen the description is the same. The words are, "situate in the county of Attakapas, on the right or south side of the Bayou Teche, bounded on the upper side, by land claimed by Talmadge Dunleavy, giving so much front on said Bayou as will, with the depth of forty arpents, include the quantity above expressed." There cannot be a doubt that the two descriptions apply to the same tract of land. From Berwick, the defendant claims title by several mesne conveyances, about which there is no dispute. The plaintiffs say the tract of land mentioned in the deed, is not the same as that confirmed by the commissioners; we believe it is. They further say, as the title was confirmed to them in 1812, they are entitled to it; we do not think so. Whatever title they had, was derived

Where the evidence shows that the ancestor of the plaintiffs had sold and transferred his interest, in a settlement right, or tract of land, five years before its confirmation by the government, although confirmed in his name, it enures to the benefit of the transferee, and the heirs of the original grantee, cannot recover it.

from their father, and he had, five years before, sold all his rights. They are his heirs, and bound to guarantee the title to Berwick, and, therefore, if there were any defects in it, which they have supplied, it enures to Berwick, and his vendees, and is a protection to the plaintiffs. It was, and is now, a common practice to present titles to the land officers, in the names of the original grantees, or their legal representatives, and so have them confirmed. In general, it is most prudent for those officers to act on them in that way, and leave the claimants to share their titles, from the grantee, in the ordinary way. It saves much labor, and often prevents injustice from the exparte examination of numerous and complicated questions of law and fact.

We are of opinion, that the plaintiffs have no ground of action, and, therefore, affirm the judgment of the District Court, with costs.

PEUCH, BEIN & CO. *vs.* PALFREY, SYNDIC, AND SAUNDERS.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, FOR THE PARISH OF ST. MARY, THE JUDGE OF THE SIXTH PRESIDING.

When the record contains no motion for a continuance, or reasons offered for one, the affidavit of the party, that he was absent and his counsel not in attendance at the trial, cannot be received in this court, to open the judgment and remand the case for a new trial, on the ground that great injustice has been done.

This is a suit on an injunction bond, against Saunders the surety therein; and against the syndic of the creditors of George Whiting & Co., for the sum of six hundred and seventy-five dollars, for damages occasioned by the wrongful suing out of an injunction. The plaintiffs show that they had a judgment against one William Youngblood, and had seized twenty-seven hogsheads of sugar, which was enjoined.

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The injunction was dissolved with damages, but the sugar being released the plaintiff's demand was not paid.

On the trial of the case, there was no counsel appeared for Saunders. He was absent, and his former counsel, one had died and the other was made a judge.

It was suggested by Gibbons that the defendant was not represented by counsel. There was, however, no motion for a continuance and the judge proceeded with the case.

There was judgment against the defendant, Saunders, for three hundred and seventy-four dollars, with 10 per cent. per annum interest. The defendant appealed.

Maskell, for plaintiff, urged the affirmance of the judgment.

Gibbons, contra, briefly adverted to the hardship of the case, caused by the party's absence, and the trial without counsel. He urged upon the court the necessity of granting relief, and a new trial.

2. In order to obtain a reversal of the judgment, and to have the case remanded for a new trial, the counsel offered the affidavit of the defendant Saunders, showing the facts and hardship of his case, in being tried in his absence and without counsel.

Garland, J., delivered the opinion of the court.

The plaintiffs commenced this suit against the defendants on an injunction bond, executed by Whiting & Co., and Saunders as surety, filed in a suit commenced by Whiting & Co., to arrest the execution of a judgment which the plaintiffs had against William Youngblood. The injunction was dissolved. There was judgment in the court below against Saunders, the surety, and he appealed. The record comes up with a certificate, that it contains all the documents and evidence adduced by the parties on the trial of the cause. In this court, the defendant does not contest the correctness of the judgment rendered upon the evidence, but asks us to remand the cause, offering to the

court an affidavit made since the judgment was rendered, alleging that a continuance was improperly denied him, when asked for in the court below. The record contains no motion for a continuance or any reason offered for one, but the counsel contends this court ought to listen to it now, and remand the cause, if injustice has been done. The adoption of any such practice, would lead to endless delays and difficulties in the administration of justice, and cannot be tolerated. It is expressly forbidden to us to enter into an examination of any such questions, unless they appear on the record. *Code of Practice, articles* 894, 895. 8 *Martin, N. S.*, 435, 453. 1 *Louisiana Reports*, 323. 3 *Idem.*, 516. 6 *Idem.*, 402.

We have been asked to give ten per cent. damages for a frivolous appeal, but as the judgment is against a surety and bears ten per centum interest per annum, we have decided not to allow them; but affirm the judgment of the District Court, with costs.

COMPTON *vs.* PALFREY, SYNDIC, &C., AND SAUNDERS.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, FOR THE PARISH OF ST. MARY, THE JUDGE OF THE SIXTH PRESIDING.

A party cannot be heard, on his affidavit in the Supreme Court, asking to remand the case for a new trial, on the ground that he was absent, and had no counsel to represent him, when the cause was called for trial in the inferior court.

This is an action against the syndic of the creditors of Whiting & Co., and G. Y. Saunders, as surety, on an injunction bond, enjoining an execution of the plaintiff, which had been levied on a quantity of sugar, the property of his debtor, William Youngblood. The injunction was adjudged to have been wrongfully sued out, and was dissolved with damages.

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M'MILLIN vs. CARLIN.

This suit is instituted to recover of the plaintiffs and surety, in the injunction. There was no defence at the trial. The defendant, Saunders was absent, and none of his counsel appeared for him; one having died, and the other promoted to the bench. There was judgment against the defendants, and Saunders appealed.

Gibbons, for the appellant, offered the affidavit of Saunders in this court, showing the facts of his absence at the time suit was called for trial, and his not being represented by counsel, praying that the cause be remanded for a new trial; alleging that great injustice had been done him.

Maskell, contra, insisted on the affirmance of the judgment.

Garland, J., delivered the opinion of the court.

All the facts and circumstances in this case, being precisely similar to those in the case of Peuch, Bein & Co., against the same parties, just decided, *ante* 97, the court have, for the reasons stated in their opinion in that case, come to the same conclusions, and, therefore, affirm the judgment of the District Court, with costs.

M'MILLIN *vs.* CARLIN, CURATOR, &C.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT FOR THE PARISH OF ST. MARY, JUDGE LEWIS, OF THE DISTRICT, PRESIDING.

Where the defendant in an injunction, staying executory proceedings, joins issue, and prays for judgment for the amount of his debt; he thereby changes the proceedings from the *via executiva* to the *via ordinaria*, and cannot have the injunction dissolved with damages, so as to proceed with his seizure on his mortgage.

This suit commenced by injunction to stay an order of seizure and sale, which the defendant had obtained, and was proceeding to sell certain mortgaged property.

The pleadings on which the parties joined issue are fully stated in the opinion of the court.

On hearing the parties, the district judge dissolved the injunction as having been wrongfully obtained; condemning the plaintiff and his surities to pay ten per cent. interest on four hundred dollars, the amount of the debt; and ten per cent. damages, and all costs; and that the sheriff proceed as if no injunction had been granted, and execute the order of seizure and sale. The plaintiff appealed.

Dwight, for the plaintiff, assigned various errors in the proceedings, and urged the reversal of the judgment.

T. H. Lewis and *Maskell*, for the defendant.

Morphy J., delivered the opinion of the court.

Godfroy Carlin, as curator of Claire Allen, an interdicted person, took out an order of seizure and sale, on two promissory notes of three hundred and fifty dollars each, one payable on the 1st of April, 1836, and the other on the 1st of April, 1837, both bearing ten per cent interest per annum from their maturity; but subject to a credit of fifty-five dollars, paid by the maker, John M'Millin, on the 1st of November, 1836. The latter enjoined the proceedings on various grounds, which it is unnecessary to notice. The defendant in injunction prayed in his answer for its dissolution, and for damages against plaintiff; and one Walter Brashear, his surety on the bond. The plaintiff then filed a supplemental petition setting forth additional grounds in support of his injunction; and to this second petition the defendant made an answer, in which he prays that he may have judgment against the plaintiff for the amount of the debt, with interest and costs, and that the property mortgaged may be seized and sold to satisfy such judgment.

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Where the defendant in an injunction, staying executory proceedings, joins issue, and prays for judgment for the amount of his debt; he thereby changes the proceedings from the *via executiva* to the *via ordinaria*, and cannot have the injunction dissolved with damages so as to proceed with his seizure or his mortgage.

On these pleadings the parties went to trial, whereupon the judge below dissolved the injunction, and decreed M'Millin his surety to pay damages.

It is obvious that the defendant, by praying for a judgment against his debtor, has changed the proceedings from the *via executiva* to the *ordinaria*, and no longer asks for the seizure and sale of the particular property mortgaged to satisfy his claim; but he seeks to obtain such a judgment as he may cause to be executed on any other property belonging to his debtor, in case the proceeds of that specially mortgaged should prove insufficient. In some cases, a change in the character of the proceedings may be inferred, but in the present suit, it is expressly prayed for by the party. The executory process being thus voluntarily abandoned, the judge below should have proceeded to render judgment on the evidence adduced, as in an ordinary suit, and he has erred in decreeing damages on the injunction bond. It is evident he has also overlooked the credit of fifty-five dollars allowed the debtor in the petition for the seizure and sale of the property.

It is, therefore, ordered, ajudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; and proceeding to give such a judgment as, in our opinion, ought to have been rendered below: It is further ordered that Godfroy Carlin, in his aforesaid capacity, do recover of J. M'Millin seven hundred dollars, the amount of the two notes sued on, with interest thereon at the rate of ten per cent. per annum from their respective maturities; allowing a credit of fifty-five dollars paid on the 1st of November, 1836, and that the premises mortgaged be seized and sold, to satisfy this judgment, with the costs in the court below, those of this appeal, be paid by the appellee.

STEIN *vs.* GIBBONS AND IRBY.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, FOR THE PARISH OF ST. MARTIN, THE JUDGE OF THE SIXTH PRESIDING.

An affidavit for an injunction which states, "that the facts contained in the petition are true," is sufficient, if sufficient facts are set out in the petition itself.

If the debt is in existence *and has accrued*, although it be not due at the time of a judgment obtained or contract made in fraud of creditors, it will authorize the complaining creditor to institute the revocatory action to annul and set aside such contract or judgment.

The attacking creditor, who seeks to annul a judgment or contract made in fraud of creditors, must bring his action within one year from the date *of his* judgment, and not *of that* attacked.

This suit commenced by an injunction to restrain the sheriff from selling the defendant Gibbons' property, under an execution issued on a judgment obtained against him by one John Irby, which judgment he alleges was procured through fraud and collusion, and with a view, on the part of Irby and Gibbons both, to defraud the plaintiff who is a creditor of the latter. The injunction issued the 8th of August, 1835. There were two notes; one for fifty-nine dollars and eighty-one cents, dated April 2d, 1835, and the other for seven hundred dollars, endorsed by Josiah French as payee and first endorser, and by plaintiff as second. It was taken up and paid by French; and bears date 2d of April, 1835, payable twelve months after date. French paid it to the bank and transferred it to the plaintiff. The date of payment and transfer is not given. It fell due the 2d and 5th of April, 1836. Was put in this suit by an amended petition, filed November, 1836. An amended petition making Irby a party, charging fraud and praying for the annulment of his judgment, had been filed 29th of October, 1835. The agent of the plaintiff made oath that the facts set forth in the original and amended petition, are substantially true. The fraud was fully proved; and the plaintiff had judgment

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against the defendant Gibbons, for seven hundred dollars, with legal interest, from the 10th of November, 1836; and fifty-nine dollars, with 10 per cent. per annum, from the 2d of April, 1835; and judgment annulling Irby's judgment against Gibbons, on account of fraud and collusion, and decreeing the funds in the hands of the sheriff to be applied to the payment of the plaintiff's debt and judgment.

The defendant Irby, appealed.

Morse, for the plaintiff, argued to show that the fraud and collusion was completely shown between Irby and Gibbons, and fully authorized the annulment of Irby's judgment.

2. The injunction was properly obtained. It may be resorted to, in all cases, to stop a fraudulent sale or transfer of a debtor's property by a creditor. 5 *Martin, N. S.*, 501.

3. The plaintiff has fully made out his demand. He was one of the original endorsers on the note of Gibbons, for seven hundred dollars, and had an interest in taking it up. He would have been bound to French the first endorser at all events, and the transfer of the note made it his debt.

T. H. and W. B. Lewis, for the defendant, insisted that the plaintiff could not at any rate recover on the note for seven hundred dollars. It did not exist as a debt of the plaintiff at the time suit was originally brought; nor was the debt shown or proved when he became the owner.

2. The action to annul Irby's judgment is prescribed by one year from the time the judgment was rendered, and the plaintiff must fail in his suit.

Garland, J., delivered the opinion of the court.

The plaintiff commenced this suit by an injunction to stop, in the hands of the sheriff of the parish of St. Martin, an amount which he alleged was owing to him by Gibbons, on a promissory note, and also the amount of a note for seven hundred dollars, drawn by said Gibbons, on which he was an endorser.

It appears that in the year 1834, Gibbons, one of the defendants, being in embarrassed circumstances, wished to

cover his property in such a manner as to defraud his creditors and benefit his wife. To effect his object, he executed to Irby, another defendant, two promissory notes, one dated in June, 1832, for eight hundred dollars, with ten per cent. interest thereon, and the other, for one thousand and two hundred dollars, dated in August, 1834, with interest. In October, 1834, Irby commenced suit on these notes in the District Court of St. Martin, and after some contest with some of Gibbons' creditors, who intervened, obtained a judgment for the whole amount with interest and costs, on the 9th of May, 1835. On this judgment an execution issued, which was levied on all the property of Gibbons. A few days before the sale, the present plaintiff commenced this suit, alleging that he was a creditor of Gibbons on a note for fifty-nine dollars and eighty-one and one-fourth cents, with ten per cent interest thereon, from the 2d of April, 1835, and that he was an endorser on a note for seven hundred dollars, made by Gibbons, discounted by the Union Bank of Louisiana, for his accommodation, which he alleged he was apprehensive he would have to pay, and could not be reimbursed, if the sale was made by the sheriff and the money paid to Irby. Upon the note in bank, there were several endorsers, and the name of Josiah French, Esq., preceded that of the plaintiff; it became due the 2d of April, 1836, was protested for non-payment, *and paid in full by French out of his own funds*, as is expressly stated in the receipt, on the back thereof. When the injunction was first instituted, Irby was not made a party, but at the first term of the court after, he intervened and moved to dissolve it, for various causes, alleging that he was a judgment creditor, &c. The plaintiff thereupon, had leave to amend his petition, which he did by making Irby a party, charged him as being a party to the fraud, and of collusion with Gibbons to defraud his creditors. The allegations in this amended petition are general, and cover the whole ground. To the filing of this amendment, by the plaintiff, Irby objected, but it was overruled, he then answered to the merits, alleging the validity of his judgment, and its fairness.

Sometime in the year 1835, previous to the month of November, French paid the note in bank for seven hundred dollars, on which he, plaintiff, and others were endorsers, and then transferred to plaintiff all his right to it. Neither the date of the payment or transfer is established by evidence. On the 2d of November, 1835, the plaintiff again amended his petition, stating he was the assignee of French, of the note paid by him, reasserted the fraud and collusion between Irby and Gibbons, and claimed the amount of the note should be paid out of the funds in the hands of the sheriff. To this amendment Irby answered, and among other things alleged that this demand was prescribed by the expiration of one year from the time *his judgment* against Gibbons was rendered, and that plaintiff, as assignee of French, had lost all right to recover on the note in this form.

This action is one well known to our law, and rules for its prosecution are laid down in our code. See *Louisiana Code, from articles* 1965 *to* 1989; and many cases for the revocation of judgments and contracts, on the ground of fraud, are to be found in the reports of the decisions of this court.

An affidavit for an injunction which states, "that the facts contained in the petition are true," is sufficient, if sufficient facts are set out in the petition itself.

The first objection made by Irby, is that the affidavit annexed to the petition is defective. We have examined it, and think it sufficient. It says, "that the facts contained in the above petition are true," and by reference to the petition, we think, sufficient grounds are stated to maintain it. The Code of Practice does not require any particular form for an affidavit, to obtain an injunction, but says the party must state "under oath the facts which, according to his belief, render an injunction necessary." *Article* 304.

2. He says, that although Stein may be a creditor of Gibbons, he cannot in this mode arrest him in the execution of his judgment. We entertain a different opinion. If there were no means provided by law, to arrest the execution of judgments obtained by fraud, the most serious consequences might result to *bona fide* creditors. All the fraudulent purposes of a debtor might be carried into effect, and his property dissipated before the creditor could get a judgment annulling or revoking the fraudulent contract or judgment. We think

the plaintiff comes within the provisions of the Code of Practice, *articles* 300, 301, 303, and this court have decided the question in 8 *Louisiana Reports*, 103. 5 *Martin, N. S.*, 501.

3. He says he is not a party to the suit, and, therefore, the injunction ought to be dissolved. It is true he was not a party originally, and had he remained silent, no judgment that might have been rendered would operate against him; but he came into the District Court, intervened in the suit, and as soon as he did so, the plaintiff by an amended petition made him a party, charging him as being a participator in the fraud with Gibbons. To the filing of this amended petition he made no objection, if he did, he took no bill of exception to the opinion of the court admitting it, but answered to the merits. We think he is properly before the court.

4. He says he is a *bona fide* and honest creditor of Gibbons, and having obtained a judgment against him, he claims to execute it and receive the money from the sheriff. This brings us to the facts of the case, and upon a minute examination of the evidence, we are authorized in saying a baser fraud was never attempted to be perpetrated. The judge who tried the cause in the court below, who saw the witnesses and heard them testify, was of that opinion, and we concur with him.

If the debt is in existence *and has accrued*, although it be not due at the time of a judgment obtained or contract made in fraud of creditors, it will authorize the complaining creditor to institute the revocatory action to annul and set aside such contract or judgment.

It has been alleged in the argument, by the counsel for Irby, that the plaintiff is not a creditor of Gibbons. That fact is shown conclusively, by the exhibition of the note for fifty-nine dollars and eighty-one and one-fourth cents, with ten per cent. interest, from the 2d of April, 1835, and of the note for seven hundred dollars, dated the 2d of April, 1835, payable one year after date, to the order of Josiah French and endorsed by him, the plaintiff and Thomas Johnston. The first note was due before the judgment was obtained by Irby, and the second was in existence though not due until afterwards. The debt, therefore, had "accrued" to use the language of article 1988, of the code.

The first note is made payable to the plaintiff, and the other is regularly transferred to him by French, the first endorser, who paid it.

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The remaining question is as to the plea of prescription. It is clear it does not apply to the note for fifty-nine dollars and eighty-one and one-fourth cents, nor do the counsel for the appellants contend it does; but they insist on its application to the note for seven hundred dollars. They say the plaintiff stands precisely in the same situation as French would have done, if he had not transferred the note to the plaintiff, which is indisputable, and the question is, could French have recovered if, instead of transferring the note to plaintiff, he had commenced a suit in November, 1836, to revoke the judgment of Irby against Gibbons. The counsel for the appellant contends, that the article 1989, which limits this action to one year from the date of the judgment, means that the time is to commence from the date of the judgment attacked. We believe otherwise. The article says "the action is limited to one year; if brought by a creditor individually, to be counted from the time he has obtained judgment against the debtor; if brought by syndics or other representatives of the creditors collectively, to be counted from the day of their appointment." This court have, on several occasions, had this question under consideration, and have decided on both branches of the prescription mentioned in the article. In the case of *Fennessy* vs. *Gonsoulin*, 11 *Louisiana Reports*, 424, the court said, the prescription is to run from the date of the judgment, which the attacking creditors may have obtained, and at page 532, of the same volume, the question as to suits brought by syndics was also settled. French had a right to bring his suit against Gibbons, at any time within five years, under the article 3505 of the code, and one year from the date of his judgment, to commence a suit against Irby and Gibbons. Having transferred all his rights to the plaintiff Stine, he can, we think, prosecute them in this action.

The attacking creditor, who seeks to annul a judgment or contract made in fraud of creditors, must bring his action within one year from the date *of his* judgment, and not *of that* attacked.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

COX *vs.* REES ET AL.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, FOR THE PARISH OF ST. MARTIN, THE JUDGE THEREOF PRESIDING.

All persons appealing, and seeking to reverse a judgment, must bring before this court, every party who has an interest in having it sustained.

So, where a rule was taken on the clerk, to compel him to issue an execution in a particular form, and he refuses, no appeal will lie *against him alone*, from a judgment sustaining his course and discharging the rule. The clerk has no interest in sustaining such a judgment.

This case comes up from the decision of the judge *a quo*, on a rule taken by the plaintiff on the clerk of the District Court, requiring him to show cause why he should not issue an *alias fieri facias* against the defendants.

It is shown that a final judgment of the Supreme Court, was rendered in September, 1836, and entered as the judgment of the District Court, in October following, against David Rees, principal, and J. H. Thomas, as surety, for one thousand four hundred and ninety-eight dollars and fourteen cents with ten per cent. interest, from the 16th of June, 1827, until paid; and that a certain tract of land mortgaged by Rees to the plaintiff, be first seized and sold to satisfy the same. Upon this judgment execution issued, and the sheriff returned that the land mentioned, had been sold on a prior mortgage, and that Rees was dead, and his succession in a course of administration as an insolvent one.

The plaintiff's attorney applied for an *alias fieri facias* against the surety; and the clerk refused to issue it, on the ground that the judgment was conditional and that the land mortgaged for the debt, must be *first* discussed and sold. Upon this refusal, the plaintiff took the rule in question. The clerk appeared by counsel, and showed for cause that the judgment against Rees and Thomas required, as a condition precedent, that the tract of land mortgaged to the plaintiff, by Rees, should be *first* seized and sold to satisfy the judgment, which had not been done; and until this was done, he considered it his duty to refuse the execution.

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There was judgment on the rule for the clerk; the court considering that he had shown sufficient cause for not issuing the execution. The plaintiff appealed.

Voorhies, for the plaintiff, contended that the court below certainly erred, for if this remedy is denied, there is an end to the right. It does seem to me clearly competent to show, that the property required by this court to be first discussed, is no longer susceptible of being so. On showing this, why should not the plaintiff have his recourse against the surety? Otherwise it would be a right without a remedy! Apply to the district judge to have the judgment of this court executed, he of course will refer the party to the clerk, and what will be the consequence? The clerk will forever add the *impossible condition*, and the sheriff, as a matter of course, will always make the same return! Suppose it had been a slave instead of the tract of land, and the slave had died before the execution of the judgment, would it have been contended that the execution could not have been levied on other property?

Morse, contra.

Martin, J., delivered the opinion of the court.

The plaintiff is appellant from a judgment discharging a rule, taken on the clerk of the District Court, to show cause why he should not issue an *alias* execution against the defendants in this case.

The plaintiff had obtained a final judgment, against the defendants, David Rees and J. H. Thomas, his surety, which ordered that a tract of land belonging to Rees, and was mortgaged, *should be first seized and sold to satisfy the debt* for which judgment was rendered. An execution issued, and the sheriff returned, "that Rees was dead and his estate insolvent, and administered in the Probate Court by his widow, under the benefit of an inventory, against whom no proceedings could be had under the writ of *fi. fa*:" "and that the land ordered to be seized was in the hands of a third possessor, who purchased it at sheriff's sale under a former seizure." On this return

being made by the sheriff, the plaintiff's attorney applied for an *alias fieri facias* in the usual form, without reference to the discussion of the land ordered to be first seized; but the clerk *refused*, on the ground that the judgment required as a condition precedent the discussion of said land; whereupon a rule was taken on him, to show cause why the execution should not issue in the manner and form required. The clerk showed cause, and upon the issue thus made the rule was discharged; and the plaintiff has appealed as against the clerk.

All persons appealing, and seeking to reverse a judgment, must bring before this court, every party who has an interest in having it sustained.

We have often said, that whoever applies to us for the reversal of a judgment, must bring before this court all those who have an interest that it be sustained. We cannot pass on the rights of those to whom no opportunity has been afforded to be heard. In the present case, the only appellee is the clerk of the District Court, who has nothing at stake and is without authority to represent those who have an interest to support the judgment. There not being proper parties before this court, the appeal cannot be sustained.

It is, therefore, ordered, adjudged and decreed, that the appeal be dismissed, with costs.

MOUTON *vs.* DROZ.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, FOR THE PARISH OF LAFAYETTE, THE JUDGE OF THE DISTRICT PRESIDING.

A defence that bad shingles were furnished by plaintiff, will not avail the party, in his excuse for making a bad roof, when he made no objections to their quality before putting them on.

When a jury passes upon the manner in which a job of work has been performed, their verdict will not be disturbed on slight contradictory evidence.

This is an action of damages. The plaintiff shows that he contracted with the defendant to build him a house, which

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was not finished and built in a workmanlike manner; but on the contrary was so defective, and badly built and covered, that plaintiff had to take off the entire roof from the house, and cover it with new shingles. The rain beating through the roof, had destroyed the painting, and injured the furniture.

He claims seven hundred dollars in damages.

The defendant pleaded a general denial, and averred that he finished the house in a workmanlike manner, and any defects in the roof were such as proceeded from causes independent of him. He prays that the suit be dismissed.

The cause was tried before the court and a jury.

The evidence fully sustained the plaintiff's allegations in relation to the roof of his house. The only palliation which appeared for the defendant was, that the shingles originally put on the house, were furnished by the plaintiff, and a carpenter swore he had examined the roof, and he could not make a good roof with those shingles and guarantee it. Several other of defendants witnesses testified to the badness of the shingles furnished by the plaintiff, and to the bad weather when they were put on. The testimony in this respect was slightly contradictory.

The jury returned a verdict of three hundred and sixty-nine dollars and fifty-six cents, for the plaintiff, and from judgment rendered thereon, the defendant appealed.

Crow, for the plaintiff.

Neveu, for the appellant insisted that, from the contradictions in the testimony, the case should be remanded.

Morphy, J., delivered the opinion of the court.

A defence that bad shingles were furnished by plaintiff, will not avail the party, in his excuse for making a bad roof, when he

This is an action for damages sustained by plaintiff, in consequence of the defective and unworkmanlike manner in which defendant has made the roof of a dwelling house which he had undertaken to build for the plaintiff. The defence set up is, that the defects, if any there are in the roof as complained of, must be ascribed to the bad quality of the mate-

rials furnished by plaintiff, and not to the manner in which the work has been executed. This issue was placed before a jury, who brought in a verdict for a small portion of plaintiff's claim. The defendant, after an unsuccessful effort to obtain a new trial, appealed.

It does not appear that defendant before using the shingles, furnished by plaintiff, objected to their quality. On other points, the evidence is somewhat contradictory, but we have seen nothing in it which makes it our duty to disturb the verdict of the jury.

It is, therefore, ordered, that the judgment of the District Court be affirmed, with costs.

made no objections to their quality before putting them on.

When a jury passes upon the manner in which a job of work has been performed, their verdict will not be disturbed on slight contradictory evidence.

LINTON'S HEIRS *vs.* WALSH.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, FOR THE PARISH OF ST. MARTIN, THE JUDGE OF THE SEVENTH PRESIDING.

A promise to pay certain drafts by the defendant, who avers that he drew them as agent, will bind him personally, and authorize the drawee who has paid the drafts, to recover the amount from him. The case is stronger when the principal disavows the acts of his alleged agent.

This is an action by the legal representatives of John Linton, deceased, against the defendant, as drawer of three drafts, amounting to seven hundred and forty dollars; which were drawn on, and paid by John Linton, in his lifetime, as is alleged, for the benefit of the defendant.

The defendant admitted he drew the drafts as alleged, but averred that he drew them as agent of F. D. Conrad, Esq. He denies that he is liable, in any manner, for the amount of said drafts, inasmuch as he never authorized John Linton, to accept any draft for him.

The drafts were drawn in the following form.

"New Iberia, 22d June, 1833."

"At ninety days sight, please pay to the order of Messrs. H. R. Lee & Co., $150; value received, *on account of F. D. Conrad*, and oblige your obedient servant."

"S. W. WALSH."

"To John Linton, Esq.
New-Orleans."

The evidence showed that the defendant was agent of F. D. Conrad, in the management of a plantation; who states that he drew the drafts on account of it; but Conrad expressly disavowed his authority to draw the drafts in question. They were paid by Linton, and afterwards put in the hands of Joshua Baker for collection, who states that the defendant promised to give a draft on the firm of Lastrapes & Desmare, for their amount, but failed to do so. He said he or Mr. Conrad would pay them by the 1st March, 1836. Walsh always said Conrad should have paid them. Witness told him, that Linton's estate had no obligation from Mr. Conrad, and that they had to look to him for payment, and he to Conrad. The latter said, defendant was to pay them and not him, as they were for the defendant's individual account.

The defendant in a letter, says it is out of his power to give a draft on Lastrapes & Desmare as he expected. He says, "I shall do all I can to see it paid, either by Mr. Conrad, or myself, between this time and the month of March. Should you insist on suing me, it will only be making costs, without hastening payment of the debt. I consider Mr. Conrad as bound, in his settlement with me of the affairs of *Pare Perdu* plantation, for *all the drafts* I gave, and were accepted by Mr. Linton, or *none* of them."

There was judgment for the defendant, and the plaintiffs appealed.

Maskell, for the plaintiffs, showed that during the progress of the trial in the lower court, the defendant offered as evi-

dence the depositions of Thompson and others, taken under a commission dated 25th July, 1837; to the admissibility of which the plaintiff, by his attorney, objected, and filed a bill of exceptions, the ground of which objection is:—

That the commission was ordered to be returned without delay, instead of specifying a particular day; See *Code of Practice*, 439; 8 *Martin, N. S.*, 450.

2. That proof of agency devolved on the party claiming the right, and having failed to establish his legal authority to draw said drafts, he became personally liable for their payment. 4 *Martin, N. S.*, 528, 502; 5 *Idem.*, 138; 2 *Louisiana Reports*, 244; 6. *Idem.*, 47; *Civil Code*, 2971, 2982.

Morse, contra, insisted that, by the evidence and declarations of the defendant, he was not personally bound to pay these drafts. And his promises only go to show that he would see the drafts paid: But he always said Mr. Conrad was liable, and not him. They were for, and on Conrad's account.

Garland, J., delivered the opinion of the court.

This suit is instituted on three drafts, drawn by the defendant on the late John Linton, in the year 1833, payable in thirty, sixty and ninety days, and amounting to seven hundred and forty dollars, directing the amount to be charged to Mr. F. D. Conrad. Linton accepted, and paid the drafts, and when he called on Conrad for the amount, he refused to pay it, saying the defendant was not authorized to draw on his account. He then called on the defendant to pay the amount, who in the summer of 1835, to use the language of one of the witnesses, "promised to give a draft on the late firm of Lastrapes & Desmare, payable on the 1st of March, 1836, in favor of plaintiffs for said drafts, but told deponent he wished to see Mr. Desmare, previous to giving said draft," he at the same time, said Mr. Conrad ought to have paid the amount. On the 26th of September, 1835, he wrote a letter

to Joshua Baker, Esq., who was the attorney of the plaintiffs, in which, after explaining why he could not give the draft on Messrs. Lastrapes & Desmare, which he had promised, he says, "I wish you in the meantime to feel assured, that I shall do all I can to see it paid, either by Mr. Conrad or myself, between this time and the month of March next." He also expresses the hope no suit will be brought against him, as it would not hasten the payment, and further expresses his intention to "consider Mr. Conrad as bound in his settlement of the affairs of the *Parc Perdu* plantation, for all the the drafts given by him, and accepted by Linton. In April, 1837, this suit was commenced, and the defendant then denied his liability, and reasserts that he drew the drafts as Conrad's agent. The District Court gave a judgment for the defendant, from which the plaintiffs appealed.

There is a bill of exception, in the record, to the opinion of the court below, rejecting certain depositions offered by the defendant, which we do not consider it necessary to decide upon, as the testimony, if admitted, would not change the opinion we entertain as to the liability of the defendant.

A promise to pay certain drafts by the defendant who avers that he drew them as agent, will bind him personally, and authorize the drawee who has paid the drafts to recover the amount from him. The case is stronger when the principal disavows the acts of his alleged agent.

We do not concur in the opinion of the District Court. Admitting for the argument, that the position taken by the defendant, in the first instance, was correct, yet his subsequent promise, verbally and in writing, to pay the drafts, binds him. No principle can be clearer than that, if an agent draws a draft or bill of exchange, which is paid by the drawee, and the agent afterwards promises to become personally responsible, that he is bound by the engagement, and the case is stronger, when the reputed principal disavows the act, and refuses to sanction it.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided, and reversed; and this court, proceeding to give such judgment as ought to have been given in the court below, do further order and decree, that the plaintiff do recover of, and have judgment against the defendant, S. W. Walsh, for the sum of seven hundred and forty dollars, with interest thereon, at

the rate of five per cent. per annum, from the 13th day of April, in the year 1837, until paid, and costs in both courts.

LOUSSADE, *vs.* HARTMAN ET AL.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, FOR THE PARISH OF ST. MARY, THE JUDGE OF THE SIXTH PRESIDING.

Trespassers are jointly liable in actions of tort; and where there are several trespassers, they must all be joined in the same action, and judgment entered in relation to all; and if against them, each one is condemned for his proportion of the damages.

So, where four persons were sued as co-trespassers for killing or causing the death of a slave, and judgment taken against two only: *Held*, that the judgment was erroneous in not including all, and against each one for his proportion of the plaintiff's damages; and judgment of non-suit was rendered.

This is an action for damages, in which the plaintiff seeks to recover the value of a slave, which he alleges was killed, or his death caused by the conduct of the defendants.

The plaintiff shows that his slave Sandy, was on his way to and near the house of a neighbor, on the 2d April, 1836, where he had written permission to go every evening to see his wife and children; and that, at about the hour of 10 o'clock, he was arrested on his neighbor's premises by the defendants Hartman, Theriot, Bemiss and Vining, who called themselves a patrol. That his said boy had his written pass which he showed, but the defendants persisted in whipping and punishing him without any just cause; and in the struggle which ensued, Sandy escaped and run towards the Bayou Teche, which was about one hundred yards or so from the house where he stopped. The defendants pursued him to the Bayou, threatening to kill him, when, being hotly pursued, he threw himself into the Bayou, to avoid being taken, and was drowned.

The plaintiff further alleges, that the defendants are liable

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for the value of said slave, who was a good mechanic and carpenter, and worth three thousand dollars. He prays judgment against said defendants, for their illegal conduct in causing the death of his slave, for his value.

Hartman and Theriot, two of the defendants, pleaded the general issue and justified their conduct. They averred that they were doing the duties of patrol in the neighborhood of one Manuel Delukie's, under the direction of their leader, and came upon this negro at Delukie's and demanded his pass, which after much insolence the negro produced, and it was pronounced by the patrol not to be legal; he was ordered to be whipped, when he broke away and run into a back-room. One of the party went in after him, when the captain called to him to stop and not further trouble the negro, when the person replied no damned negro should run over him. Sandy broke and run into the Bayou; and one of the defendants took a pirogue, and attempted to save him from drowning, but was unable to do so. The defendant, Hartman, did not pursue the slave. They pray that the plaintiff's demand be rejected.

There was an amended petition, correcting an error in relation to one of the defendants, substituting the name of Darwin Bemiss instead of J. B. Bemiss, who was originally sued. Neither D. Bemiss or Vining were cited.

Upon these issues and pleadings the cause was tried before the court and a jury.

There were several witnesses examined, touching the conduct of the defendants and the manner in which the slave was lost.

Upon the whole evidence of the case, the jury returned a verdict for the plaintiff in the sum of one thousand dollars, and after an unsuccessful effort to obtain a new trial, from judgment thereon, against Hartman and Theriot, they appealed.

Morse, for the plaintiff and appellee.

T. H. and *W. B. Lewis*, for the defendants.

Martin, J., delivered the opinion of the court.

This is an action against Hartman, Theriot, Bemiss, and Vining, to recover the price of a slave, drowned in consequence of an illegal act of the defendants. In an amended petition the plaintiff stated that John B. Bemiss had been, through error, made a defendant, instead of Darwin Bemiss, and prayed that the error might be corrected, and the latter cited; and that he might have the remedy against him, which he had prayed for against the former; but said Darwin Bemiss was never cited, nor was the defendant Vining, or any curator appointed to represent them.

There was a joint judgment against Hartman and Theriot, and they appealed.

The legislature has given us no direction for the prosecution of suits on joint obligations arising from torts; but they have *on those* resulting from contracts. The Louisiana Code says, that "in every suit or joint *contract*, all the obligors must be made defendants, and no judgment can be obtained against any, unless it be proved that all joined in the obligation, or are by law presumed to have done so." *Article* 2080. And when one of the joint obligors has discharged or performed his part of the contract, he is still required to be made a defendant to the suit. *Idem.*, 2082.

Trespassers are jointly liable in actions of tort: and where there are several trespassers they must all be joined in the same action, and judgment entered in relation to all; and if against them, each one is condemned for his proportion of the damages.

The appellants contend that, in the present case, the suit is brought against four defendants, *in solido*, on an obligation resulting from a tort; while on such obligations the code gives a *joint action only*. *Louisiana Code, article* 2304. The judgment is joint, and it is against two of the defendants only; and, therefore, the action must be considered a joint one. The judgment is consequently erroneous, because the petition charges that a trespass was committed by four persons, from which the law raises a joint obligation against all, and not a several one: For on joint obligations judgment must be given against each defendant for his proportion, which is regulated by the number of obligors.

It has been urged that the part of the Louisiana Code, relating to joint obligations, on which the counsel for the

So, where four persons were sued as co-trespassers, for killing, or causing the death of a slave, and judgment taken against two only: *Held*, that the judgment was erroneous in not including *all*; and against each one for his proportion of the plaintiff's damages; and judgment of non-suit was rendered.

appellants rely, is to be found in the chapter which treats of conventional obligations and ought not to be extended to obligations resulting from torts.

We are of opinion, that being without a rule given us by the legislature for the prosecution of joint actions, on obligations arising from trespasses, we cannot resort to an arbitrary one, but are bound to adopt *that* given in cases that have the greatest analogy to the one before us. Now, suits in actions on joint obligations resulting from contracts, have the greatest analogy to suits on joint obligations arising from trespasses. We, therefore, adopt the rule in the code, relative to conventional obligations. According to this rule, the judgment cannot stand, because it is not against each of the defendants and appellants for his proportion of the plaintiff's damages, and because their co-trespassers are not included in the judgment.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, and that there be judgment against the plaintiff, as in case of non-suit, with costs in both courts.

LE BLANC *vs.* HIS CREDITORS.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, FOR THE PARISH OF ST. MARTIN, THE JUDGE OF THE SIXTH PRESIDING.

An order or judgment of the Court of Probates, erasing the legal and special mortgage of a minor, under the act of 1830, and giving a special mortgage *on part only*, of the property of the tutor, in lieu of the first, cannot be attacked collaterally, when third persons have purchased property released by these proceedings; it must have its effect until reversed or annulled in a direct proceeding or action.

So in the suit of a minor, on arriving at the age of majority, to annul an order or proceeding of the Probate Court, it cannot effect the rights of third persons, who purchased under the faith of these proceedings, sanctioned by the Court of Probates.

This is an opposition to the tableau of distribution, filed by the syndic of the creditors of Edward Le Blanc, the ceding debtor.

On the 23d of May, 1823, Edward Le Blanc was appointed dative tutor to Modeste Le Blanc, the opponent in this case, and gave a special mortgage on a plantation and four slaves to secure the payment of the sum of one thousand four hundred and seventy-two dollars and thirty-seven cents; as is alleged, in pursuance of the act of 1817, which authorized tutors to give *special mortgages in lieu of security for their administration.*

The opponent alleges, that at the time of the appointment of her dative tutor, his property all became liable and tacitly mortgaged for the security of her debt. She further states, that in 1832, with the advice of a family meeting, her said tutor attempted to have the mortgage on the slaves, which were liable under her original and legal mortgage, released, and gave a special mortgage on his plantation. That the syndic of his creditors have not placed her on the tableau as a privileged creditor, except for the proceeds of the plantation last mortgaged, which sold for only one hundred and seventy-five dollars; whereas she claims to have the first privilege on all the property surrendered.

The syndic pleaded the general issue, and averred that the special mortgages were valid. That the plaintiff has been placed as a privileged creditor for the proceeds of the land last mortgaged, which is all the privilege to which she is entitled.

It is shown by the evidence that, in 1832, on application to the Court of Probates, with the advice of a family meeting, the insolvent, Edward Le Blanc, obtained a decree or judgment, annulling all the former mortgages in favor of the minor, (this opponent) and executed a special mortgage on his plantation alone, in lieu thereof. Three of the four slaves, included in and subject to the former mortgages, are admitted to have been surrendered and sold; and their proceeds would more than pay the opponent's claim.

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After the proceedings in the probate court, erasing the first mortgage and executing the special mortgage on the plantation alone, several creditors obtained and recorded judgments against the ceding debtor, before the surrender. They have been placed on the tableau as general mortgage creditors.

The whole case turns on the validity of the proceedings purporting to annul and cancel the first mortgage, and give a second on a particular piece of property. The opponent insists they are null and void.

There was judgment for the plaintiff in opposition, allowing her a privilege and mortgage on the proceeds of the three slaves sold by the syndic, for the amount of her demand, with interest. The syndic appealed.

Voorhies, for the opposing creditor, contended, that the mortgage given by the insolvent, under the act of 1817, ought to have its full force and effect; the obligation arising under it, cannot be impaired by any subsequent legislative enactment: "A law can prescribe only for the future; it can have no retrospective operation, nor can it impair the obligation of contracts." *Louisiana Code, article* 8.

2. The mortgage in question was given under the act of 1817, which authorized tutors to give special mortgages, in lieu of security, for their administration; and no law then existing authorized *its change or release*; it became a vested right, and could not be impaired by any subsequent legislative enactment. Hence, all the proceedings which were had in July, 1832, by virtue of the act of 1830, for the purpose of annulling this mortgage, were absolutely null and void. *Constitution of Louisiana, article* 6, *section* 20. 1 *Louisiana Reports*, 347.

3. Contracts are always made without reference to the laws in force at the time of making them; this mortgage or contract was, therefore, made with reference to the laws in force in 1823, the time when it was made. No laws enacted after could impair its obligation. This principle is too plain to admit of any doubts.

4. Granting for a moment that the tutor had the right, under the act of 1830, of changing this mortgage, was it done accordingly? No. There was no change of the mortgage, but *purely and simply a release on the slaves.* What property was mortgaged in 1832? Was it other than that contained in the first or original mortgage? No, the same land was mortgaged, excluding the slaves! Does this constitute "*changing a special mortgage,*" or does it simply amount *to a release of mortgage?* If it is simply a release, does the act of 1830 authorize it? If not, can the family meeting and the probate judge, in their proceedings, which are against law, destroy the rights of the appellee? They cannot. The duties of family meetings are determined by special laws, and are restricted to particular objects, and, whenever their acts are not confined to those restrictions, they have no effect, and must be treated as mere nullities. The only duty which the acts of 1830 imposed on the family meeting, was *to recommend a change of the special mortgage. Act of* 1830, *page* 46.

5. The judgment of the probate court, annulling or cancelling the mortgage, is an absolute nullity. It is a court of limited jurisdiction, and among the powers delegated to it, this is not one of them; it had no jurisdiction *ratione materiæ. Code of Practice,* 92.

6. The proper time for settling a question of privilege, against an insolvent estate, is upon the filing of the tableau. If the syndic refuses to place a creditor thereon, as he demands, or as is right, he may compel him by opposing the tableau; but the syndic has no right to complain, and he should not be allowed to appeal. 4 *Martin, N. S.,* 462. 3 *Idem.,* 553. 7 *Idem.,* 131. 1 *Louisiana Reports,* 172. 11 *Idem.,* 531.

T. H. Lewis, for the syndic and appellant, insisted that, by the law, as it stood in 1823, *lands only,* and not slaves, could be specially mortgaged by tutors in favor of their minors. *Session acts of* 1811, *section* 5, *page* 32, *Idem.,* 1817. *section* 1, *page* 120.

2. By the act of 1830, section 8, page 48, it is provided that the property to be mortgaged by a tutor, &c., shall be first appraised.

3. The judgment of the Probate Court, annulling a former mortgage, is in full force, and cannot be collaterally inquired into or attacked. It cannot be attacked but by direct action of nullity. Purchasers under judgments of the Probate Court, must be protected. 9 *Louisiana Reports*, 196. 14 *Idem.*, 469.

Martin, J., delivered the opinion of the court.

The syndic is appellant from a judgment, by which the tableau of distribution, filed by him is amended, and Modeste Le Blanc, whose dative tutor the insolvent was, is placed thereon as a mortgaged creditor, for the whole of her claim; the syndic having put her down for a small part only.

In 1823, the insolvent was appointed dative tutor to the minor, and gave a special mortgage on a plantation and four slaves; and in 1832, he obtained an order or judgment of the Court of Probates, cancelling and erasing this mortgage, and also the legal mortgage existing in favor of said minor, and gave a new one on a small plantation alone. This was done in pursuance of the act of the legislature, approved March 11th, 1830, entitled "an act in addition to the laws now in force, relative to tutors and curators of minors." The plantation or land thus mortgaged, was surrendered, and sold by the syndic for eight hundred dollars, when the husband of the appellee became the purchaser; but on failing to comply with the terms of sale, it was sold a second time, at his risk and cost, for only one hundred and seventy-five dollars; for this sum she is placed on the tableau, as a mortgage creditor. She claims to be ranked as a general mortgaged creditor, on all the property of her tutor, for her entire claim, amounting to one thousand four hundred and seventy-two dollars and thirty-seven cents.

An order or judgment of the Court of Probates erasing the legal and special

After the erasure of the first mortgage, and before the surrender, several creditors obtained judgments and had them

recorded against the tutor; and they were collocated as such on the tableau.

The only question which this case presents, is whether *the order* of the Court of Probates, accepting the last mortgage, and erasing and cancelling all the previous ones, is not a judgment which must have its effect, until it be reversed or annulled.

The District Court appears to have solved this question in the negative. We are of opinion it erred. In the case of *Lesassier* vs. *Dashiell*, 14 *Louisiana Reports*, 467; we held, "that whatever may be the result of a suit, by which a minor, on arriving at the age of majority, seeks to annul an order or proceeding like this, it cannot affect the rights of third persons, who purchased under the faith of these proceedings, sanctioned by the Court of Probates."

The rights of the judgment creditors cannot be affected, otherwise than by reversing or annulling the judgment of the Court of Probates; as by that judgment the special mortgage of the appellee was cancelled, as regards the slaves, on whose proceeds she seeks to claim a prior mortgage; and also, any legal or general mortgage which she might have had on the property of her tutor, up to the time of its rendition.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, and that the opposition be dismissed; the appellee paying costs in both courts.

mortgage of a minor, under the act of 1830, and giving a special mortgage *on part only*, of the property of the tutor, in lieu of the first, cannot be attacked collaterally, when third persons have purchased property released by these proceedings; it must have its effect until reversed or annulled in a direct proceeding or action.

So, in the suit of a minor, on arriving at the age of majority, to annul an order or proceedings of the Probate Court, it cannot effect the rights of third persons, who purchased under the faith of these proceedings, sanctioned by the Court of Probates.

CARRIERE & BORDUZAT vs. MEYER ET AL.

APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH OF ST. MARTIN.

Judgment creditors of an estate in the course of administration, cannot take out execution against the administrator, without first notifying such judgment to him, that he may show he has no funds to satisfy and pay it.

Creditors having judgments against an estate, have it in their power, at any time, to compel the administrator to account, and show the true state of the funds.

The plaintiffs having obtained a judgment against the estate of Ursin Gonsoulin, deceased, administered by his widow, Emilie Leocadie Meyer, tutrix of the children, for the sum of one thousand five hundred and forty-five dollars and sixty-five cents, took a rule on her, alleging that more than three months had elapsed since she should have rendered an account, and filed her tableau of distribution of the funds of the estate of her deceased husband; and that it has been shown she has funds in her hands belonging to said estate. It was ordered, that she, together with her present husband, show cause, if any they have, why execution should not be taken out against them, and that a sufficient amount of her property be seized and sold, to satisfy the plaintiffs' judgment.

The defendants in the rule answered, and pleaded the general issue, and averred that as administratrix, she had already paid more than three thousand dollars of privileged debts; and that there is not a sufficiency to restore and pay her dotal and paraphernal effects and property, which she avers amounts to six thousand six hundred dollars, for which she has the highest privilege and mortgage. She prays that her claim be allowed on the tableau for this sum; and that she be discharged from the administration. She offered evidence of the amount of her claim, which was rejected.

On these pleadings and issues, the probate judge decided that it was shown she had funds of the estate in her hands, and had never rendered an account or filed her tableau, but

remained in possession, and neglected to pay over said funds in satisfaction of the plaintiffs' judgment; and that in consequence, she is responsible, personally, for the amount thereof, under the *article* 1057, *of the Code of Practice.* The rule was made absolute, and execution ordered to issue accordingly. The defendants appealed.

Voorhies, for the plaintiffs, showed that the entire estate of Gonsoulin, inventoried upwards of four thousand seven hundred dollars, and the property sold so far back as 1833. The plaintiffs obtained their judgment against the estate, contradictorily with the administratrix, in July, 1835, and it is not yet satisfied; nor has she rendered any account, or paid over the funds in her hands. The present proceedings were commenced in 1837, and she has not yet paid any thing.

2. The defendant having taken no steps, whatever, to file a tableau of distribution, or to render an account of her administration, and to have her rights settled contradictorily with the creditors of the estate, she has now rendered herself liable, personally, for the amount of the plaintiffs' claim.

Morse, for the defendant.

Morphy, J., delivered the opinion of the court.

Plaintiff having obtained a judgment against the defendant as administratrix of the estate of her deceased husband, Urain Gonsoulin, had a rule served on her several years afterwards, to show cause why they should not be authorized to take out against her an execution under which her property, to a sufficient amount to satisfy their judgment, should be seized and sold. To this rule the defendant made answer, that she had paid privileged debts of her husband's estate to a large amount; the vouchers for which, she would exhibit on the trial of the case; and that there was not a sufficiency of funds in her hands to satisfy her dotal rights. The rule was made absolute, and defendant appealed.

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CARRIERE & BORDUZAT *vs.* MEYER ET AL.

Judgment creditors of an estate in the course of administration, cannot take out executionagainst the administrator, without first notifying such judgment to him, that he may show he has no funds to satisfy and pay it.

This rule, taken on the administratrix, appears to us to have been premature. It does not appear that notice of the judgment liquidating the plaintiffs' claim against the estate, and ordering them to be placed as ordinary creditors for its amount on the tableau of distribution, has ever been served on the defendant. Had it been notified to her as required by law, she would have informed the sheriff that she had no funds to satisfy it. It would then have been in order for the plaintiffs to compel her, by a motion to the court, to prove the truth of her declaration, by filing within a specified time, a brief statement of her situation with regard to the succession. Had she failed to prove that she had no funds in her hands belonging to the estate, the plaintiffs would have been entitled to the execution they now seek to obtain. Such is the course pointed out by law, when an administrator is sought to be rendered personally liable for a sum due by the estate he administers. *Code of Practice, articles* 1054–55–56–57.

Creditors having judgments against an estate have it in their power at any time, to compel the administrator to account and show the true state of the funds.

Much has been said in the argument, of the defendants' neglect and dereliction of duty in not rendering any account of her administration. The reproach is well founded; but it comes with a bad grace from creditors, who, having obtained their judgment in 1835, had it in their power to compel her to file her account, or satisfy their claim.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates of the parish of St. Martin, be anulled, avoided and reversed, and that the rule taken in the premises be discharged; the plaintiffs and appellees paying costs in both courts.

COOK *vs.* PARKARSON.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, FOR THE PARISH OF ST. MARY, THE JUDGE OF THE DISTRICT PRESIDING.

Parole evidence cannot be received to show that certain improvements, for which the note sued on was given, had not been made, as expressed in a deed or act of retransfer of certain property from the plaintiff to the defendant.

So, where an act of retransfer of property expressly states, that the sum of five hundred dollars was to be paid in consideration of the rescission of the sale, no parole evidence can be received to contradict it, or show that this consideration did not exist.

This is a suit on a promissory note. The defendant avers that there was no consideration given therefor; it being executed through error, on a transaction between him and the plaintiff, relative to a sugar plantation, which was retransferred to him, on his giving this note for the supposed improvements which had been put on it by the plaintiff after he purchased; but which in fact had not been done.

On the trial, the defendant offered parole evidence, to show that in fact the pretended improvements had not been made. To this evidence the plaintiff objected, on the ground that it was contradicting the consideration, as admitted by the defendant in the act of sale, making the retransfer. That the evidence was not competent, as it only went to establish error or lesion. The objection was sustained, and the defendant excepted.

There was a verdict and judgment for the plaintiff, and the defendant, after an unsuccessful attempt to obtain a new trial, appealed.

Maskell, for plaintiff.

Fisher, contra.

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Morphy, J., delivered the opinion of the court.

This is an action on a promissory note. The defendant pleads error, and want of consideration; he avers, that having sold a plantation and slaves to B. C. Cook, brother of the plaintiff, he agreed some time after to take back his property and annul the sale. That in consideration of certain improvements represented to have been made on the premises, he agreed to give his note for five hundred dollars, which through error he made payable to the present plaintiff, and that moreover the improvements he had consented to pay for, have never been made. The plaintiff obtained a verdict, and after attempting to set it aside, from judgment thereon, the defendant appealed.

Parole evidence cannot be received to show that certain improvements, for which the note sued on was given, had not been made, as expressed in a deed or act of retransfer of certain property from the plaintiff to the defendant.

So, where an act of retransfer of property expressly states that the sum of five hundred dollars was to be paid in consideration of the rescission of the sale, no parole evidence can be received to contradict it, or show that this consideration did not exist.

On the trial, the defendant took a bill of exceptions to the opinion of the judge, rejecting testimony to prove that it was owing to plaintiffs assurances that improvements had been made on his land, that he had been induced to give his note, when in fact no improvements had ever existed. We think the judge did not err; the written agreement, by which the defendant took back his plantation, mentions, expressly, that the five hundred dollars were to be paid in consideration of the rescission of the sale. No parole evidence could be received to prove against, or beyond, what was mentioned in the notarial deed of compromise; *Louisiana Code, article* 2256. As to the error complained of, the testimony of B. C. Cook, introduced by defendant himself, establishes that it was not through error, but by express agreement, that the note was made to the order of plaintiff, who was the real purchaser of the land; although his (witnesses) name had been used in the deed of sale. The appellee has prayed for damages for the frivolous appeal, but considering all the circumstances of this case, we do not think it a proper one to allow damages.

It is, therefore, ordered, that the judgment of the District Court be affirmed, with costs.

MOUTON, AGENT, &c. *vs.* THIBODEAUX.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, FOR THE PARISH OF LA FAYETTE, THE JUDGE OF THE DISTRICT PRESIDING.

When the plaintiff fails to make out his case clearly, he must be non-suited. So, where it did not appear, that the person suing as agent, was *really such*; and that there really was a debt due and existing in favor of the plaintiff, he was non-suited.

This is an action by the plaintiff, as agent of Don Louis Thibodeaux, to recover from the defendant, Pierre Paul Thibodeaux, the amount of a note and interest, which, it is alleged, Don Louis signed, with the defendant as his surety, to Thomas Berard, for seven hundred and thirty-two dollars; and which he has had to pay.

The plaintiff claimed the sum of seven hundred and seventy-nine dollars and ten cents, with ten per cent. interest from the 1st March, 1836.

The defendant pleaded a general denial; and averred, that the note sued upon is prescribed by the lapse of five years.

The note which the two Thibodeaux's gave to Berard, is dated the 20th July, 1830, and payable in all the month of March, 1831.

In 1834, Berard, in two receipts endorsed on the back of the note, acknowledges to have received three hundred dollars from the defendant. In August, 1835, he commenced suit for the balance. The defendants expressly denied their signatures, which had been signed by making their ordinary marks. In May, 1836, the plaintiff dismissed his suit, on the defendants paying costs.

At the foot of this judgment is the following receipt:

"Received of the *defendant* in the above entitled suit, by the hands of A. Mouton, Esq., in notes, the sum of seven hundred and seventy-nine dollars and ten cents, in full satisfaction of the note upon which the present suit is instituted.

March 1, 1836. J. BERARD."

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J. Berard, the only witness examined, says "that both the Thibodeauxs had accounts with his father, and each one settled his account. That Pierre Paul, the present defendant, settled his by giving his note for upwards of seven hundred dollars, and that Don Louis Thibodeaux signed the note in *solido* with him. Thinks the note was written by himself; the note in question is not in his hand-writing, but believes it is a renewal of the first note written by him."

No part of the debt due by Don Louis, was included in the first note written by witness. The debt due by Don Louis, he gave a separate note for, which he exhibited in court.

On this testimony, there was judgment for the amount of the note, with interest from March, 1831, until paid. The defendant appealed.

Crow, for the plaintiff, urged the affirmance of the judgment, as clearly authorized by law.

Voorhies, for the defendant, strenuously resisted payment, on the ground that there was no evidence to show that the defendant was really indebted.

Martin, J., delivered the opinion of the court.

The plaintiff, as agent for Don Louis Thibodeaux, claims a a sum of money, which he alleges he paid for his principal, who was the surety of the defendant, Pierre Paul Thibodeaux, and on his account.

A suit had been brought on a note signed by the principal and the defendant, on the dismissal of which, the creditor or payee acknowledged he had received from the *defendant*, by the hands of A. Mouton, seven hundred and seventy-nine dollars and ten cents, in full satisfaction of the note.

The plaintiff contended, this was evidence of a payment made by his principal for the present defendant. There was judgment against the defendant, for seven hundred and thirty-two dollars and twenty-five cents, with interest, at ten per cent. per annum, from March, 1831; this being the amount of the above note, with interest, from the date of its maturity.

It is in evidence, that a former note had been given by the same parties, in which they were bound *in solido*, for a sum, upwards of seven hundred dollars, due by the defendant to the payee of the note above stated; and the last mentioned note was believed, by the witness, to have been given in renewal of the former one, but of this he is not sure.

It appears to us the court erred. The payment made by Mouton, is stated to have been effected for the *defendant*, in the singular. But there were two defendants, and nothing shows that Mouton was, at the time, the agent of the person for whom he has brought the present suit. We must, therefore, consider the payment as made for both of the defendants. The plaintiff has, in our opinion, not made out his case.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; and that there be judgment of non-suit against the plaintiff, with costs in both courts.

Where the plaintiff fails to make out his case clearly, he must be non-suited.

So, where it did not appear that the person suing as agent, was *really such;* and that there really was a debt due and existing in favor of the plaintiff, he was non-suited.

BOUTTE, F. M. C. *vs.* MARTIN ET AL.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, FOR THE PARISH OF LA FAYETTE, THE JUDGE OF THE SIXTH PRESIDING.

The surety cannot require the creditor to sue the principal debtor, before resorting to him for payment. His remedy is, to pay the debt, and exercise the rights of the creditor against the debtor, to which he is subrogated by the payment, or proceed under *art.* 3026 of the *Louisiana Code.*

A verbal agreement, to wait until the debtor can go to a certain place to procure money, with which to pay the debt, is not such a prolongation of time, as will discharge the surety.

This is an action against Andre Martin and Alexander Arcineaux, as joint and several obligors, with one Pierre Cyprien Arcineaux, on the promissory note of the latter. The plaintiff alleges, that Martin is liable as principal, and A. Arcineaux as security, and prays judgment against them, jointly and severally, for the amount of the note.

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The defendants severed in their answers. Martin admitted his signature, and pleaded a general denial. He averred that he signed as surety, not as principal, but is no longer bound, even as surety, because the plaintiff failed to institute suit against P. C. Arcineaux, the principal, at the maturity of the note, or to secure his claim by mortgage or otherwise, as he was expressly requested to do by this defendant, who was well aware of the drawer's embarrassment; that the plaintiff expressly agreed with the principal, to give him further delay or prolongation of payment, stating, also, that he never would bring suit in any court. That the principal is now insolvent, and for the reasons and grounds herein stated, this defendant is not liable, as security on the note.

The other defendant's answer was the same in substance.

The defendant, Martin, propounded interrogatories to the plaintiff, requesting him to state whether or not this defendant did not sign the note merely as surety, and whether he (plaintiff) had not agreed, with the principal in the note, to give him longer time in which to pay it; and if he had not declared he never would sue the principal?

The plaintiff answered, that when Pierre C. Arcineaux bought his beeves, he offered the defendants as security, and he agreed, and did take them as such. He received the note in the manner in which it is signed. He considered A. Martin as security, and responsible for the debt.

To the last and principal interrogatory the plaintiff answered, that he called on Martin, and the latter advised him to see the principal and get his money, or a new note with good security. Arcineaux returned with him to Martin, and proposed that he should wait three months for his money, as he was about mortgaging his property to the bank, to get money. Plaintiff asked a new note, with security. Arcineaux replied, that he could only give him his own note, which he, plaintiff, refused, preferring to keep the old note, but said he would give him three months, if he would give him a new note, with the same security. Never said he would not sue the principal, although it was not his intention to do so.

The witnesses stated, Martin asked plaintiff, if he had not given Arcineaux two months to pay the note in. The latter answered, he had given him two months, or time enough to go to New-Orleans and mortgage his property to some bank for money.

2. Pierre C. Arcineaux, the debtor, [having surrendered his property, was made a witness,] says plaintiff came to him, and told him, Martin would not continue security for him any longer, that he wanted his money or a mortgage. Plaintiff then observed to witness, to go and do his business, *que je n'entient a vous*, and do not consider Martin any longer responsible. They started to town to have a mortgage executed, but it was agreed between them that no mortgage should be given; witness promising him that he was going to New-Orleans, and expected to make an arrangement with some of the banks.

There was a verdict and judgment against the defendants. Martin alone appealed.

Voorhies, for the plaintiff.

Crow and *T. H. Lewis*, for the appellant.

Martin, J., delivered the opinion of the court.

This is an action against two sureties on a note. Judgment was given against both defendants, and Martin alone appealed.

The defence of the appellant was, that the plaintiff had neglected to sue the principal in the note, although earnestly urged to do so; and that he had indulged him with a prolongation of the day of payment.

The first plea was correctly disregarded. It is an idle one. The creditor generally requires security, to avoid suing the debtor; and the surety cannot require, before the creditor resorts to him for payment, that he should sue the principal.

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The surety cannot require the creditor to sue the principal debtor, before resorting to him for payment. His remedy is, to pay the debt, and exercise the rights of the creditor against the debtor, to which he is subrogated by the payment, or proceed under *article* 3026 of the *La. Code.*

If he wished the principal to be sued, he must pay the debt, and then exercise the rights of the creditor, to which payment subrogates him; or proceed according to the *art.* 3026 of the *Louisiana Code*, to be indemnified by the principal debtor.

The prolongation of the time of payment, without the consent of the surety, discharges him. None appears to have been given in the present case. The plaintiff had two substantial sureties, on which, we believe, he implicitly relied; for he frequently asserted, that it was not his intention to sue the principal. His conscience was probed by the appellant, and he denied having granted any prolongation. It is, however, in evidence, that the principal having asked the plaintiff to wait until he went to New-Orleans to procure the money, and return with it and pay him, the plaintiff consented.

A verbal agreement, to wait until the debtor can go to a certain place to procure money with which to pay the debt, is not such a prolongation of time, as will discharge the surety.

The jury do not appear to have considered this as outweighing the plaintiff's denegation, in his answers to the interrogatories. He had never intimated an intention to sue the principal. On the contrary, he had even denied it, and every part of his conduct shows that he looked to the sureties for payment.

The judge's refusal to grant a new trial, shows he was satisfied that justice did not require his interference with the verdict. It does not, in our opinion, authorize ours.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court, as far as it relates to the defendant Martin, be affirmed, with costs.

LE BLANC *vs.* BROUSSARD'S HEIRS.

APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH OF LAFAYETTE.

Either party may have the testimony offered in court, taken down by *the clerk*. The judge has no authority, even at the request of the parties, *to do this* when the court has a clerk, except in a case where the party *intending* to appeal, fails in getting the opposite party to make a statement of facts, then the testimoney taken down by him, in writing, will serve as a statement.

A statement of facts must be procured, by the party *intending* to appeal, *necessarily, before the appeal is granted.*

An appellant neglecting to have a statement of facts made out, when the testimony is not taken down by the clerk *before the appeal is granted*, cannot claim any relief from this court.

This is an action to compel the heirs of Theophile Broussard, among whom his succession was partitioned, to contribute proportionally to make up the loss the plaintiff sustained, in being evicted from a piece of wood-land, which had been set apart as part of her share in the succession. She alleges she has sustained a loss of five hundred dollars thereby.

The defendants pleaded a general denial, and deny that the wood-land, of which the plaintiff complains of being evicted, was sold or set off to her; and if so, she must claim her share of the community between her and her late husband, from the heirs of François Broussard, who caused all the property of Theophile Broussard's succession to be sold.

The Probate Court decreed, that the plaintiff recover from the defendants, jointly and severally, the sum of three hundred dollars, with five per cent. interest, and they appealed.

The case comes up on the pleadings, without any evidence, statement of facts, or bill of exceptions.

The clerk of the Probate Court certifies that he did not attend the trial, and that the Parish Judge frequently takes up probate cases out of the regular term; tries them, and takes down the evidence himself. That this case was decided in December, and the judge died the beginning of June following.

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Neveu, attorney of the appellant, filed his affidavit, stating that, at his request, the evidence adduced by the parties was taken down by the judge who tried the case, and who promised to make a statement of facts. That it appears, by the certificate of the clerk, the judge has died since the trial of this cause, and that the evidence or statement of facts has been lost or mislaid, and cannot be found. "That the judge after the trial, took time to advise, and it was some time afterward before final judgment was rendered and signed."

Crow, for the defendants, moved to dismiss, as there was no evidence in the record, or statement of facts, to enable the court to try the case.

2. It will be seen that it was the appellant's fault that there was no statement of facts, for it was not until after the parish judge's death, which was six moths after the judgment, before any application was made to have the transcript made out.

Neveu, for the appellant, strenuously urged that the case be remanded, to afford him an opportunity to have it properly tried and placed before the court, to be heard on the merits. He insisted that, whenever the justice of the case required it, this court had the power to remand for a new trial, and that in the present case, there was every reason and motive to remand.

2. It was no fault of the appellant that the testimony was not taken down, or a statement of facts made out. His counsel had urged the judge to do it, but he failed or neglected, until he at last died without having made any. He insisted that the judge took a note of the evidence, and if it was lost, it was not the fault of the appellant.

Martin, J., delivered the opinion of the court.

In this case, the plaintiff and appellee moves to dismiss the appeal for want of the evidence on which *the cause was tried*, or a statement of facts.

The case was tried before the probate judge, and judgment signed on the 10th of December, 1839. An appeal was granted on the 28th of the same month, and in the following June the judge died.

The attorney who tried the cause states, in his affidavit, that at his request the "evidence adduced by the parties was taken down in writing by the judge who tried the cause, and that said evidence or statement of facts has been lost or mislaid, and cannot be found."

Either party may have the testimony offered in court, taken down by *the clerk*. The judge has no authority *to do this* even at the request of the parties, when the court has a clerk except in a case where the party *intending* to appeal, fails in getting the opposite party to make a statement of facts, then the testimony taken down by him in writing will serve as a statement.

The Code of Practice authorizes either party to have the testimony, offered to the court, taken down in *writing by the clerk*. When this is done, there is no need of any statement of facts. The judge has no authority, even at the request of one of the parties, to perform this service. If he were to do it, it would be of no avail, except in a case in which the party *intending* to appeal, should unsuccessfully apply to the opposite party to make a statement of facts. In such a case, the judge having a statement of facts to make, might give the testimony which he had taken in writing as a statement.

Some courts of probate in this state, have no clerk. In these, the judge may probably do whatever is to be done by the clerk, in the courts where one is appointed. The record shows, that in the court from whence this appeal is taken, there is a clerk. The testimony not having been taken down by the clerk, this case cannot be brought before us except on a statement of facts. Such a statement must be procured by the party *intending* to appeal, *necessarily, before the appeal is granted*. *Code of Practice*, 602. *Scott* vs. *Blanchard*. 8 *Martin, N. S.*, 303.

A statement of facts must be procured, by the party *intending* to appeal, *necessarily, before the appeal is granted*

The appellant has asked of us to reverse the judgment, and remand the case for a new trial, in order to afford him the opportunity of having the case properly brought before us, the death of the judge of probates having deprived him of the means of doing so.

If the appellant had lost the opportunity of bringing his case before this court, by the death of the judge, he would be entitled to relief, as every suitor may claim our aid, when he has not deprived himself of it by his own *laches*.

An appellant neglecting to have a statement of facts made out, when the testimony is not taken down by the clerk *before the appeal is granted*, cannot claim any relief from this court.

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The appellant having neglected to have a statement of facts made, before the appeal was granted, had no longer the faculty of obtaining one afterwards. The death of the probate judge, who lived six months after the appeal was granted, caused him no injury.

It is, therefore, ordered, adjudged and decreed, that the appeal be dismissed, with costs.

WALTON & SON *vs.* BEMISS ET AL.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, FOR THE PARISH OF ST. MARY, THE JUDGE OF THE SIXTH PRESIDING.

Where a creditor at the foot of an account, in which he has a privilege on the property sold, gives a receipt, stating he has "*received payment by note payable at four months*," it is *a payment* of the account, and extinguishes the privilege.

Where attacking creditors commence their revocatory actions about the same time, and use proper diligence, one shall not have exclusive privilege on the property fraudulently conveyed and recovered, simply because his suit was first commenced. The property must be divided *pro rata* among them.

This is an action instituted the 10th April, 1835, by the plaintiffs, to recover from the defendants, Bemiss, Brashear & Co., the amount of a note for the sum of nine hundred and eighty-eight dollars and fifty cents, being the amount of an account for the sale of a carriage and gig, sold by them to said firm, and dated the first May, 1834.

The plaintiffs allege that they have a privilege on the carriage or its proceeds, which is worth six hundred and seventy-five dollars, but that in November, 1834, Bemiss, one of said firm, and insolvent, attempted to make a transfer and sale of it, on his own account, to one Judson Harman, Milton

Johnson, and Joseph S. Tarkington, and actually delivered the same to Harman in pursuance thereof.

They allege that said sale is null and void, as made without consideration, and in fraud of creditors, to the knowledge of the vendees, and pray that it be annulled, the carriage sequestered, and they allowed the benefit of their privilege.

Harman pleaded a general denial, and averred that he purchased the carriage for a valuable consideration, from J. B. Bemiss, and in good faith.

On the 21st April, 1836, there was judgment by default made final against the defendants, Bemiss, Brashear & Co., for the amount of their note; and annulling the sale as to Tarkington and Johnson.

The case was left open between the plaintiffs and Harman. At this stage of the proceedings, Dwight and Hartman intervened, and set up claims against the defendants Bemiss, Brashear & Co., alleging that the latter were in insolvent circumstances at the time of the sale of the carriage, and that it is null; that the plaintiffs have no privilege, but having previously instituted suit against the present defendants, they (intervenors) should be preferred. They pray that the vendor's privilege on said carriage be rejected, and the proceeds of the sale of it held subject to their judgment.

To this petition of intervention, the plaintiffs pleaded a general denial; but join in the alleged nullity of the sale to Harman, and insist on the enforcement of their privilege on the price of the carriage.

Upon these pleadings and issues, the parties went to trial.

The plaintiffs produced their account of sale of the carriage and a gig, of the 1st May, 1834, amounting to nine hundred and eighty-eight dollars and fifty cents; at the foot of which was the following receipt.

"*Received payment by note, payable at four months*, with the understanding that if the note is not paid when due, Messrs. Bemiss, Brashear & Co., are at liberty to give a city acceptance, adding interest at six per cent. until paid."

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There were many witnesses examined on both sides, touching the insolvency of Bemiss at the time of making the sale of the carriage to Harman, and also to establish the claims of the intervenors. It was also shown that the intervenors instituted the revocatory action about the same time that the plaintiffs commenced the present suit, and that both suits were brought to the April term, 1835. The intervenors joined in this suit to dispute the plaintiffs' right of preference.

From all the evidence, the district judge decided that the sale of the carriage was null and void; that the plaintiffs be allowed their privilege on the carriage, or its proceeds, worth four hundred and seventy dollars, against Harman, and the claims of the intervenors were dismissed. Dwight & Hartman, the intervenors appealed.

T. H. Lewis, for the plaintiffs, insisted on the affirmance of the judgment. The plaintiffs were entitled to a privilege on the carriage, being the vendors, and should be allowed the proceeds in preference to the intervenors.

Splane, for the intervenors, objected to parole evidence being received to show the consideration of the note sued on. Its consideration is not attacked as fraudulent, and the admissions of Bemiss, the insolvent debtor, are not evidence. The intervenors should be allowed and paid by preference, having commenced the revocatory action first.

Martin, J., delivered the opinion of the court.

The plaintiffs sue on a note of the defendants, Bemiss, Brashear & Co., given for the price of a carriage, and claim a privilege on the carriage as vendors. For this purpose, they brought in the defendant Harman, who had purchased the carriage from Bemiss, his co-defendant, and they claim a rescission of the sale, as having been made in fraud of their rights, as creditors of Bemiss, Brashear & Co., who they allege were insolvent at the time of the sale, to the knowledge of Harman.

The plaintiffs had judgment on the note.

Dwight & Hartman now intervened, stating themselves to be creditors of Bemiss, Brashear & Co., and also claiming the rescission of the sale of the carriage, on the same ground as the plaintiffs, whose privilege they oppose. They claim the carriage or its price, to the exclusion of other creditors, on the ground that they had judgments against Bemiss, Brashear & Co.

There was final judgment recognizing the privilege of the plaintiffs, rescinding the sale of the carriage by their vendees, and dismissing the petition of intervention. The intervenors appealed.

Their counsel has urged that the privilege ought not to have been allowed. They show that the plaintiffs gave a receipt for the note, at the foot of the account, *in payment of it.*

Where a creditor, at the foot of an account in which he has a privilege on the property sold, gives a receipt, stating that he has "*received payment by note, payable at four months*, it is a *payment* of the account, and extinguishes the privilege.

The plaintiffs' counsel has replied, that the giving of a note *for* a debt, on an open account, is no *payment of* the debt. This is certainly true, but nothing prevents the debtor and creditor agreeing that the note *shall be* a payment. In this case the note was expressly receipted for, and taken in payment. We have held, that the receipt of a note, for the amount of an account, is neither payment or novation, but that the receipt of a note of a third person *in payment* of an account discharges it. We are now called upon to say whether there is a difference between receiving the note of the debtor *in payment*, and the receipt of the note of another. It does not appear to us there is any difference. The creditor has an interest in taking a note. It liquidates his debt, facilitates his proof, and enables him to raise money by discount. It was for the creditor to consider whether these advantages were an equivalent for the release of the privilege. The debtor places himself, by giving a note, in *duriori casu*; punctuality is more rigorously required and exacted of him. The dread of a protest compels him to exert every nerve to maintain his credit. If he has, or afterwards acquires, a claim against the creditor, he foregoes the right of offering compensation. On this consideration we conclude the privilege was improperly allowed. The words of the plaintiff

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must be taken most strongly against him, and a discharge and liberation of the debtor is favored. In *dubiis semper quod minimum est sequimur.*

The intervenors and appellants claim a preference over the plaintiffs, on the ground that they are judgment creditors, and that they instituted their revocatory action before that of the plaintiffs. Their suit was instituted in the month of February, 1835, and that of the plaintiffs, the 10th of April following. Both suits were brought to the same term of the District Court, and judgments signed on the same day, at a subsequent term. We know of no privilege resulting from a judgment on moveable property, unless execution has issued thereon. In the revocatory action, the *Louisiana Code, article* 1972, provides that, "the judgment in this action, if maintained, shall be that the contract be avoided as to its effects on the *complaining creditor*, and all the property or money taken from the original debtor's estate, by virtue thereof, or the value of such property, to the amount of the debt, be applied to the payment of the *plaintiffs.*" We think the fair and equitable meaning of the article is, that when creditors commence the prosecution of their rights about the same time, and use proper diligence afterwards, that one should not have an exclusive privilege on the property, simply because his suit was first commenced. It would be an unjust interpretation to give the law, in many cases. The case might be different, if it was apparent that one of the creditors had slept upon his rights, and neglected to assert them with reasonable diligence.

Where attacking creditors commence their revocatory actions about the same time, and use proper diligence, one shall not have an exclusive privilege on the property fraudulently conveyed and recovered, simply because his suit was first commenced. The property must be divided *pro rata* among them.

It is, therefore ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, so far as it decrees that the plaintiffs, M. Walton & Son, have a privilege, as vendors, on the carriage which was sold to Judson Harman; also, so far as it decrees that said carriage shall be given up, or the value thereof, to wit, four hundred and seventy dollars be paid exclusively for the benefit of plaintiffs, and, also, in decreeing the dismissal of Dwight & Hartman's intervention: And proceeding to give such judgment

as ought to have been rendered by the District Court, it is ordered and decreed, that Judson Harman do pay into court, without delay, the sum of four hundred and seventy dollars, for the use of the said plaintiffs, M. Walton & Son and Dwight & Hartman, and judgment is given in their favor, against him for that sum, which is to be divided between said Walton & Son and Dwight & Hartman, *pro rata*, the amount of the claim of Walton & Son being established by the judgment of the District Court, that of Dwight & Hartman being established by the judgment of the same court, in the case No. 286, subject to such deductions as may be made from it, in case the note of J. H. Allen shall be decreed as a credit on it, or a recovery effected against John E. Carson and Thomas Johnson. The aforesaid judgment is affirmed in other respects, the plaintiff paying all the costs in this court, also, those of the intervenors in the court below.

DWIGHT & HARTMAN *vs.* BEMISS ET AL.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, FOR THE PARISH OF ST. MARY, THE JUDGE OF THE SIXTH PRESIDING.

Persons who are not creditors of an insolvent debtor, may purchase and receive transfers of his property after he is in insolvent circumstances, and it cannot be complained of by his creditors, when they appear to be purchasers for a valuable consideration, and in good faith.

But, if an insolvent debtor use the proceeds of sales of his property, in such a manner as to give a preference to one creditor over another, the law will interfere and correct it.

Where a creditor receives a note from his debtor, to collect and pay himself, he is bound to use due and proper diligence to collect it, or he will be charged with the amount.

This is a revocatory action. The plaintiffs, who were creditors of John B. Bemiss, an insolvent debtor, instituted this their revocatory action against him and others, to whom

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he made sales or transfers of his property, on the eve of insolvency, in fraud of them as *bona fide* creditors. They allege, that being in insolvent circumstances, and indebted to them in the sum of six hundred and forty dollars, he sold and transferred to one Judson Harman, a carriage worth four hundred and seventy dollars, with a view of giving him an unjust preference as a creditor; and also that he sold and conveyed to Donelson Caffrey, John E. Carson, Milton and Thomas Johnson, a slave named Henry; and that these conveyances were made for the purpose of defrauding them, and giving unjust preferences to others. They pray that these sales be annulled, and the property restored; that they have judgment against Bemiss for the amount of their demand, and that this property be sold to satisfy the same.

The defendants, Milton Johnson and Caffrey, failed to answer. Harman pleaded the general issue; and Carson and Thomas Johnson, denied all fraud, and averred they were not creditors of Bemiss, but purchased the slave Henry, in good faith, and in the ordinary course of business.

Bemiss, the principal debtor, admitted the execution of the note sued on, and averred it was given on a settlement, for a balance due the plaintiffs. He denied all fraud, and explained the several transfers of his property complained of.

On the evidence adduced, there was a verdict against Bemiss for the amount of his note; and against Harman for four hundred and seventy dollars, the price or value of the carriage; and also against Carson and Thomas Johnson, for eight hundred dollars, the price or value of the slave; also annulling all the sales, and transfers. There was judgment, on this verdict, against Bemiss, Harman, Carson and Thomas Johnson, and also against Milton Johnson, not included in the verdict, and discharging Caffrey. Three of the defendants appealed.

The facts on which this case turns, are more fully explained in the opinion of the court.

Splane, for the plaintiffs, contended that the judgment should be affirmed, being fully supported by the evidence.

The law gives the complaining creditor the right to attack and have annulled, all sales and transfers of property made by the insolvent to one set of creditors or persons, in preference of other and *bona fide* creditors.

T. H. and *W. B. Lewis*, for the appellants, insisted that it was only sales and transfers of the insolvent debtor's property, made by him to creditors, in preference of other creditors, that can be attacked in this mode of proceeding. The defendants, Johnson and Carson, not being creditors of Bemiss, the sale to them, of the slave in question, is good. It is not giving a preference to one creditor over others, but is a *bona fide* sale, and in the ordinary course of business. 6. *Louisiana Reports*, 538.

2. Johnson and Carson gave a good and valuable consideration, in cash, for the slave, which was paid to Caffrey. They, not being creditors, had the right to purchase, and the insolvent had a right to sell his property for cash, as long as he was in possession. What he may have done with the money is another matter. It cannot affect the appellants.

3. Creditors must show that they have been injured by the transactions of their debtor, before they can set them aside in the revocatory action. *Louisiana Code*, 1973.

4. The defendant is entitled to a credit for the amount of Allen's note, because the plaintiffs received it to collect and account for the proceeds. They have neglected, or failed to collect it, through their own fault or mismanagement, and must be charged with its amount.

5. In contracts by insolvent debtors, it must be shown that those who claim the benefit of such contracts knew of his insolvency otherwise they are not liable. There is no evidence that the appellants knew of the insolvency of Bemiss. 4 *Louisiana Reports*, 256. *Louisiana Code*, 1980, 1979.

6. If contracts with insolvent persons be onerous, they cannot be set aside, unless the person who contracts with the insolvent acted in bad faith, even though there may have been a design to defraud, on the part of the debtor, except when the property has been sold for one fifth less than its value. *Idem.*, 1974–5–6.

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Garland, J., delivered the opinion of the court.

The plaintiffs sue John B. Bemiss, to recover six hundred and forty dollars, with interest, due on two promissory notes. They make Judson Harman and Milton Johnson, parties, alleging that Bemiss was in insolvent circumstances, and that he had transferred to them, or one of them, a carriage of the value of about four hundred and seventy dollars, with a view of giving an unjust preference to them or some others of his (Bemiss') creditors. They also made Donelson Caffrey, John E. Carson and Thomas Johnson, defendants, alleging, that the former as the agent of Bemiss, or at his instance, had conveyed to the two latter a slave named Henry, for the purpose of paying them a pretended debt, when in fact, Bemiss was not in any manner indebted to said Carson and Johnson. There are other allegations in the petition, in relation to other property, which it is not necessary to notice, as all the litigation before us has been in relation to the carriage and the slave Henry. The plaintiffs say, all the conveyances were made for the purpose of defrauding them, and giving unjust preferences to others. Caffrey and Milton Johnson filed no answer, and a judgment by default was rendered against them. Harman's answer is equivalent to a general denial. Thomas Johnson and Carson, in their answers, deny any fraud, they say they were not creditors of Bemiss in any manner, that they purchased the slave in good faith, for a valuable consideration, in the ordinary course of business, and their object was not to aid in giving an improper preference to any creditor. Bemiss, in his answer, says he signed the notes sued on, that they were given for balances due the plaintiffs, by himself, and the firm of Bemiss, Brashear & Co., on a settlement that took place a few days previous to their dates, in the course of which he made various payments to plaintiffs, and also gave them a note drawn by J. H. Allen, on which was due the sum of two hundred and fifty dollars, which they were to collect and place to his (Bemiss') credit. He further says, that the payments, transfers, &c., made to his co-defendants complained of, were not made in fraud of plaintiffs rights, or

those of any other person, but were made as similar transfers and assignments were to plaintiffs, for the purpose of discharging the debts he was owing.

The jury rendered a verdict against Bemiss, for the sum of six hundred and forty dollars, and interest. They discharged Caffrey from all liability, and they further found against Harman, for four hundred and seventy dollars, the price of the carriage, and against Carson and Thomas Johnson, for eight hundred dollars, the value of the slave. They say nothing about Milton Johnson, the other defendant, yet the court renders a judgment against him, and also against Bemiss, Harman and Carson, and Thomas Johnson, for the sums above mentioned, and discharge Caffrey from all liability. From this judgment, Harman, Carson and Thomas Johnson have appealed.

An inspection of the record, together with those in the cases of Walton & Son, against Bemiss, Brashear & Co., and others, and the present plaintiffs against them and others, which have come up with this, show that, at the trial, there was a continuation of the scramble and confusion, which commenced when the insolvency of Bemiss and his partners became known, and which accounts for some of the errors into which the court below has fallen. Harman is condemned to pay the value of the carriage, in two different judgments, signed on the same day, when the court had in one of them, decided that the plaintiffs had no claim upon it, and had dismissed their intervention on that ground.

The evidence in the case, creates a strong impression on our minds, that the plaintiffs do not come into court with unsoiled hands, their notes being dated at a time when they say, themselves, that Bemiss was insolvent, and it appears by their receipt for Allen's note, that they were endeavoring to secure something from the wreck, and obtain that preference for themselves, which they complain of so much in others.

As we have in the case of Walton & Son, against Bemiss, Brashear & Co., just decided, reversed the judgment, and permitted the plaintiffs to come in with them, for their share

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Persons who are not creditors of an insolvent debtor, may purchase and receive transfers of his property, after he is in insolvent circumstances, and it cannot be complained of by his creditors, when they appear to be purchasers for a valuable consideration and in good faith.

But if an insolvent debtor use the proceeds of sales of his property, in such a manner as to give a preference to one creditor over another, the law will interfere and correct it.

Where a creditor receives a note from his debtor to collect and pay himself, he is bound to use due and proper diligence to collect it, or he will be charged with the amount.

of the claim against Harman, the judgment against him in this case must be reversed, as it is not just he should pay twice.

The plaintiffs specially state, in their petition, that Carson and Thomas Johnson were not creditors of Bemiss at the time Caffrey made the sale of the negro to them, and they say the same. There is no evidence in the record to show they were creditors, or that they were interposed to give an undue preference to others, who were creditors. And admitting for the argument, that they were interposed, we do not see how the plaintiffs could recover without making the favored creditors parties to the suit. As the transaction is presented to us, the evidence is insufficient to establish bad faith in Carson and Thomas Johnson; they appear to be purchasers for a valuable consideration, and we cannot agree with the jury as to the correctness of their verdict. The purchase of the slave seems to have been in the ordinary course of business, and ought not, in our opinion, to be annulled upon the evidence now before us. A person in embarrassed, or even in insolvent circumstances, may sell his property to another, for a valuable consideration, but if he use the proceeds in such a manner as to give a preference to one creditor over another, the law will interfere and correct it, but with that the purchaser has nothing to do, unless he is a party to the fraud, and interposed for the purpose of perpetrating it. *Louisiana Code, articles* 1973–74–75–76.

As this case must be remanded, it is necessary, to a correct decision of it, that the effect of the receipt given by plaintiffs to Bemiss, for Allen's note, be decided. We are of opinion that, if it shall appear, on the trial, that the plaintiffs have used due diligence in endeavoring to collect that note, and could not do so, then they are not to be charged with it; but if proper diligence has not been used, then they ought to be charged with it. If Allen was notoriously insolvent, a knowledge of that fact will excuse them.

It is, therefore, ordered, adjudged and decreed, that judgment of the District Court be annulled and reversed, the

verdict of the jury be set aside, so far as they concern the defendants, Judson Harman, John E. Carson and Thomas Johnson. That a judgment be entered in favor of said Harman; he having in the suit of *M. Walton & Son* vs. *Bemiss, Brashear & Co. et al.*, been condemned to pay the value of the carriage, to said Walton & Son, and the plaintiffs. It is further ordered and decreed, that as relates to the defendants Carson and Thomas Johnson, this cause be remanded for a new trial, to be proceeded in according to law; and as to the distribution of the amount to be collected from Harman, it is to be made upon the principles settled in the suit of *M. Walton & Son* vs. *Bemiss, Brashear & Co. et al.*, in which these plaintiffs are intervenors: It is further ordered, that the plaintiffs pay the costs of this appeal.

MELANCON'S HEIRS *vs.* ROBECHAUD'S HEIRS.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, FOR THE PARISH OF ST. MARTIN, THE JUDGE OF THE SEVENTH PRESIDING.

On remanding a cause for trial, between the warrantors, the plaintiff, in the demand in warranty, may amend his answer so as to claim damages from his warrantor. The amended answer does not change the substance of his demand, or legal the recourse against his warrantors.

Under the old *Civil Code*, the party evicted will not be allowed, as damages, a proportion of the price of sale, equal to the quantity of land from which he has been evicted: But in assessing damages, when the sale is not cancelled, he is only to be re-imbursed the *value of the evicted part, according to its estimate at the time of the eviction.*

When the court is unable, from the evidence, to assess the value of the evicted premises, it will remand the case for this purpose.

This case involves a series of litigated contests, remarkable in the history of our jurisprudence, beginning in the year 1819, coming down to the present time, and still pending. This legal controversy has been prolonged from peculiar circumstances, until nearly all the original parties have

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died off, and the second and third generations are destined to battle the glorious uncertainty of the law, to a sad conclusion, and reap the bitter fruits of an unprofitable controversy, when there is nothing left but a couple of arpents front, of poor land, on the borders of the bayou Teche, to be received as the prize of the victorious party, which remains a blighted and barren monument of the unprofitableness of a protracted law suit. The eminent counsel who were employed to conduct this extraordinary case, in the outset of their professions, have labored and battled at the bar, until they have grown rich and become weary of legal strife, and one of them has retired, on his ample fortune, to enjoy the comforts and blessings of a quiet life, while the other is elevated to the distinguished station where law, justice and equity meet together, and are dispensed with a view to end the bitter strifes and unprofitable legal controversies of men.

At the probate sale of the succession of Charles Melançon, deceased, in the Parish of St. Martin, in 1819, Dr. Jean Duhamel, became the purchaser of a tract of five arpents front of land on the bayou Teche, for the price and sum of six thousand one hundred and fifty dollars, payable by instalments. When the first instalment became due, and suit instituted to recover it, in 1820, Duhamel, finding he had made a bad bargain, resisted payment, on the ground that all the formalities of law, in selling minor's property, had not been complied with, but was unsuccessful. See 10 *Martin*, 225.

This suit again appeared, because the judgment did not express the sum for which it was given, but this court said the "judgment was valid, although the *sum* is not stated therein, when it appears in the record." 3 *Martin, N. S.*, 7. The case now assumed a new form, in the person of *Pierre Broussard* vs. *Jean Duhamel*, to evict the latter of the largest portion of the five arpents of land, when the court decided, "that a witness having an interest in the question to be determined, and none in the event of the suit, the objection goes to his credibility and not to his competency;" and "that purchasers under the same title, without partition, cannot prescribe

against each other, by the lapse of ten years." From the concealment of a book of surveys, the plaintiff, Broussard, succeeded in evicting Duhamel of three arpents of this land, and the latter brought in the Melançons on their warranty. They attacked Broussard's judgment in an action of nullity, but it was decided no action of nullity would lie against a judgment of the Supreme Court, although instituted in the court where the judgment was first rendered; 2 *Louisiana Reports*, 8. Pierre Broussard renounced the benefit of his judgment of eviction against Duhamel, but too late to be of any service; some other persons claimed the land under him, although Duhamel was not put out of possession. Melançon's heirs now instituted suit for the last instalment of the price due by Duhamel, the latter set up the judgment of eviction, and prayed a rescission of the sale, to which they offered the renunciation of Broussard, of all advantages and benefits under *that* judgment. The case was remanded from this court, without a decision on the merits. See the case, 4 *Louisiana Reports*, 362. By this time, Duhamel was dead, and his curator had leave to discontinue all claim for damages against his warrantors, (Melançon's heirs) for the eviction, preferring to have the sale rescinded and get clear of a hard bargain. See the case of *Broussard* vs. *Duhamel et al.* 4 *Louisiana Reports*, 366. On the return of the case to the District Court, there was a judgment rescinding the sale of this land, and Melançon's heirs appealed. The judgment was reversed, and a new judgment given against Duhamel's curator and surety in the original purchase, for the amount of the last instalment due of the price. See 7 *Louisiana Reports*, 286. A re-hearing was granted, and upon a re-argument, the decision reversing the judgment of the District Court, rescinding the sale, was taken back, and a new opinion given, rendering judgment affirming *that* of the District Court. See 11 *Louisiana Reports*, 317. Melançon's heirs, now turned upon the heirs of Frème Robechaud, the original vendor of Melançon, on their warranty for damages.

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Upon the issue thus made up, the district judge decided that the heirs of Robechaud, were bound to indemnify the heirs of Melançon for all the expenses, losses and damages resulting from the eviction. To ascertain the *quantum* of damages, the price for which the land was sold at the probate sale of Charles Melançon's estate, to wit, six thousand one hundred and fifty dollars was taken as the measure of the damages occasioned by the eviction. The court then decreed, that the defendants should pay three thousand seven hundred and ninety-six dollars, the proportion which the price of the evicted premises bears to the original sale, with legal interest from the time the instalments of said price became due until paid, one thousand dollars the amount of fees paid counsel, and two hundred and seventy-four dollars costs; in all the gross sum of five thousand and seventy-one dollars and sixty-seven cents, with interest; to be paid jointly by Robechaud's heirs. They appealed.

The case was argued by Mr. *Voorhies*, for the plaintiffs and appellees; and by *T. H. Lewis* and *I. E. Morse, Esqrs.*, for the defendants in warranty.

Morphy, J., delivered the opinion of the court.

The history of this case is a long one, and may be read by the curious in several volumes of our Reports. See 10 *Martin*, 225. 3 *Martin, N. S.*, 7 *and* 11. 4 *Louisiana Reports*, 362 *and* 366. 7 *Idem.*, 286, *and* 11 *Idem.*, 317. Suffice it to state, for the purpose of the opinion, that Jean Duhamel, having been finally evicted of three arpents of a tract of five arpents of land, which he had purchased from the heirs of Charles Melançon, the cause was remanded for the assessment of his damages against his warrantors. The curator of the estate of Duhamel, who had died before any further proceedings were had in the case, prayed for and obtained leave to dismiss the suit in relation to the prayer for damages, and the judgment, allowing such dismissal, was affirmed by this tribunal, on an appeal brought up by the warrantors.

On the return of the case to the District Court, in 1838, the heirs of Melançon, obtained leave to amend the answer

by which they had cited in warranty their vendors, the heirs of Frère Robechaud. The case was then continued from term to term, until the fall term of 1838, when by leave of the court, again granted, the heirs of Melançon filed an amended answer, claiming damages of their vendors to the amount of twenty thousand dollars. Judgment having been rendered for a portion of the sum claimed, the warrantors appealed.

On remanding a cause for trial, between the warrantors, the plaintiff, in the demand in warranty, may amend his answer so as to claim damages from his warrantor. The amended answer does not change the substance of his demand, or legal the recourse against his warrantors.

Our attention has been drawn to a bill of exceptions, to the opinion of the judge *a quo*, overruling a motion to annul and set aside the order, permitting the heirs of Melançon to file their amended answer for damages. We think the judge did not err. In suits of this kind, there are as many issues joined as there are successive warrantors called in, and it is customary and convenient, before trying them, to await the decision of the main issue in relation to the title. The heirs of Melançon have been very slow and remiss, it is true, in their proceedings, but their warrantors have been equally so, for they could have had the case set down at any time. The original issue, joined between them, was still pending and undecided. The dismissal of Duhamel's claim for damages could not affect or destroy that of the Melançon's against their own vendor, for the price paid or other damages suffered. Their amended answer did not change the substance of their demand or legal recourse against their warrantors; for under their original citation in warranty, they could have obtained, upon sufficient proof, every thing which the law authorizes a vendee, who is evicted, to recover of his vendor. 14 *Louisiana Reports*, 138; *Vascocu's Widow and Heirs* vs. *Pavie*. The amended answer then only sets forth in detail, the damages they expected to prove; of this, the warrantors cannot complain. But we differ with our learned brother as to the measure of damages to be allowed in a case like the present. The land had been sold by the heirs of Melançon, in 1819, for six thousand one hundred and seventy dollars. He has allowed them as damages a proportion of this price, equal to the quantity of land of which they have been evicted. We find in the old *Civil Code*, under which the sale to the Melan-

Under the old *Civil Code*, the party evicted will not be allowed, as damages, a proportion

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çon's was made, the rule we are bound to follow in assessing their damages. It provides, *article* 61, *page* 357, "if in case of eviction of a part of the thing, the sale is not cancelled, the value of the evicted part is to be re-imbursed to the buyer, *according to its estimate at the time of the eviction*; and not proportionally to the total price of the sale." The record contains no evidence of the value of the three arpents recovered by Broussard in 1824. One witness only speaks of the value of the land; he appraises it at five hundred dollars the front arpent, at the time he was testifying, to wit, in 1840.

of the price of sale, equal to the quantity of land from which he has been evicted: But in assessing damages, when the sale is not cancelled, he is only to be re-imbursed the *value of the evicted part, according to its estimate at the time of the eviction.*

It has been pressed upon us, by the counsel for the heirs of Melançon, that the price they obtained from Duhamel for the land, in 1819, should be considered as its value, and as giving a correct measure for the damages they suffered in consequence of the eviction. This we cannot do, for, independant of the positive rule chalked out for us in the law itself, we do not believe that the land was ever worth that price. The estimate of its present value, by a witness well acquainted with the value of lands in this vicinity, shows that if at one time it was as valuable as pretended, it must have been ever since on the decline. The price obtained by the Melançon's has always been considered as very high; and it is now almost a matter of juridical notoriety, that the collusive and fraudulent manœuvries between Broussard and Duhamel, had only for their object to rid the latter of a very bad bargain. Nay it has more than once been admitted at the bar, that the land is at present of little or no value; what then were the three arpents of it worth in 1824? we cannot say. Under such circumstances, we have thought it best to remand the case for a new trial, that justice might be done between the parties.

When the court is unable, from the evidence, to assess the value of the evicted premises, it will remand the case for this purpose.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be reversed, and that this cause be remanded, to be proceeded in according to law; the appellees paying costs in this court.

GUIDRY *vs.* GUIDRY'S HEIRS.

APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH OF ST. MARTIN.

Where an heir was not made a party to the proceedings in a settlement and partition of the successions of his ancestors, he is not bound or liable, under the judgment rendered, for any of the shares or balances that may be decreed against him.

To render a partition valid and binding, all the parties to it must be cited or notified; and all the formalities prescribed by law must be pursued, to authorize a judgment of homologation, and make it binding.

Before plaintiffs can issue a *fieri facias*, they must first notify their judgment to the defendant.

So, where a judgment of partition, decreeing a balance due by an heir to his co-heirs, has not been regularly notified to him, and he was not made a party to the proceedings had in making the partition, he will be entitled to a perpetual injunction against such judgment.

This suit commenced by injunction, to stay an execution and sale, under a judgment of *Joseph Guidry et al* vs. *Louis Guidry*, for one thousand one hundred and forty-two dollars, which the plaintiff alleges is null and void, for the following reasons:

1. He never was cited, or appeared. 2. There was no issue joined by him, or any one authorized to appear for him. 3. It is an action of partition, and so far from his owing his co-heirs any thing, they are indebted to him; that he is entitled to a large balance against them on settlement. 4. Was never cited to appear and answer their petition; there was no judgment by default, and in fact he never knew of the existence of the suit. He prays for an injunction against the sheriff and Joseph Guidry, père, and all the other plaintiffs therein. He also prays that all the plaintiffs in that suit be cited, and that he have judgment annulling said judgment and all the proceedings therein, and that the injunction be made perpetual; that he be allowed to establish his rights and claims against his co-heirs, in the estate of his

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deceased father and mother, and that a partition thereof be made.

He further alleges, as grounds of nullity against this judgment, that he was insolvent, and had made a surrender of his property to his creditors at the time that suit was brought, and was incapable of standing in judgment. Syndics were appointed, settled his estate, and were discharged in May, 1833.

The defendants plead a general denial. They aver, the plaintiff was cited in the suit of Joseph Guidry, père, &c.; issue was joined by him, or one authorized to appear for him, and he actually appeared by Isaac L. & J. Baker, his attorneys.

That the estate of Marguerite Miller, his mother, was definitively settled and partitioned, and homologated the 3d April, 1835. That the plaintiff was a party to said proceedings, and was represented by his said attorneys, who filed an answer in the name of said plaintiff and others, and their acts are legal and binding. That the plaintiff being represented, presented all the claims he had at the time of making said partition. That upon the settlement of the community between Pierre Guidry, père, and Marguerite Miller, the plaintiff was indebted by note to said community in the sum of two thousand dollars; had received from his mother, a tract of land worth one thousand dollars, and purchased two thousand eight hundred and nineteen dollars worth of property at a sale of the community; making an aggregate of six thousand and six dollars. That his share in said community was four thousand two hundred and forty-one dollars, which leaves a balance due him of one thousand seven hundred and sixty-five dollars. That at the settlement of the estate of Pierre Guidry, plaintiff was entitled, as one of his heirs, to two thousand and fifty dollars. To be deducted, amount received from Major Baker, two hundred and four dollars, and one thousand two hundred and twenty-five dollars and fifty cents, amount of note given by himself and wife for purchases at sale of succession. Said amounts deducted, leave a balance of six hundred and twenty dollars, which

deducted from amount due by him to the estate of Marguerite Miller, leaves one thousand one hundred and forty-two dollars. That the judgment rendered in said partition suit, in which the plaintiff was represented, now forms *res judicata*. That he cannot now avail himself of any plea or defence which he might have interposed in said suit. That he has mistaken his remedy; he should have appealed, and not proceeded by injunction. They aver that the injunction was wrongfully sued out, is illegal and vexatious, and should be dissolved with damages against him and his surety.

On the trial the plaintiff offered in evidence, the suit of *Louis Guidry* vs. *His Creditors*, which was objected to, as *res inter alios acta*, and because it was filed long before the decease of Pierre Guidry, père, which formed the basis of the action of partition.

The defendants offered in evidence several suits against the plaintiff to establish their demands, set up as matters of account in the defence; and also the power of attorney from the heirs of Pierre Guidry, père, to J. L. Baker, dated 13th December, 1825.

The testimony of witnesses was also taken, involving a mass of evidence growing out of the transactions and settlement of the two successions of Pierre Guidry and his deceased wife, Marguerite Miller. These two successions were blended together. The power of attorney given by the plaintiff and some of the co-heirs, only authorized Baker to represent them in the settlement of Pierre Guidry's succession. Baker died during the pendency of these proceedings, but had appeared under this power in both cases. His death was in 1830, and the final partition was made in 1835, in which the plaintiff is brought in debt for the sum of one thousand one hundred and forty-two dollars. He had never appeared, or was represented in any other way than by Baker; and had, in the meantime, made a surrender, and took the benefit of the insolvent laws.

There was judgment against the plaintiff dissolving the injunction, and he appealed.

T. H. Lewis and *Morse*, for the plaintiff and appellant, urged the reversal of the judgment.

Voorhies, for the defendants, strenuously opposed the plaintiff's demand, and went into an examination of the accounts involved. He contended that Baker had a right to appear in the action of partition for the plaintiff, as his counsel, and that his acts were binding.

Morphy, J., delivered the opinion of the court.

The plaintiff has sued out an injunction, to arrest the execution of a judgment obtained against him, under the following circumstances: Pierre Guidry, the father of the parties to this suit, married twice, and had children by both marriages. Marguerite Miller, his second wife, died in 1822, leaving a large estate, to be partaken between her husband and heirs. The plaintiff failed in 1824, and placed on his schedule the heirs of Marguerite Miller, as creditors, for about two thousand dollars, which, he supposed, was the amount of his indebtedness to the estate, after deducting the sum accruing to him as one of the heirs. Pierre Guidry died in 1825. Shortly after, the plaintiff, together with some of his co-heirs, appointed Isaac L. Baker as their agent and attorney in fact, "for the settlement of the estate of Pierre Guidry, their father; to collect and receive all such sums of money as may be coming to them from said estate, and to transact for, and in their name, all such things as may be necessary for liquidating such succession." In 1827, defendants, as heirs of Pierre Guidry by the first marriage, brought an action for the partition of their father's estate, against their co-heirs of the second marriage; and prayed, at the same time, for a final liquidation of the community, which had existed between Pierre Guidry and his wife. To this petition an answer was filed, by Isaac L. and Joshua Baker, whereupon, the parish judge, acting ex-officio as notary public, under an order of the court below, proceeded to a settlement of both the estates of Pierre Guidry and Marguerite Miller. From an adjustment of the accounts in said successions, it appeared

Where an heir was not made a party to the proceedings in a settlement and partition of the successions of his ancestors, he is not bound or liable under the judgment rendered, for any of the shares or balances that may be decreed against him.

that the plaintiff stood indebted to the estate of Marguerite Miller, in a sum of seventeen hundred and sixty-three dollars and twenty-five cents, and was entitled to receive from that of his father, six hundred and twenty-two dollars and ninety-one cents. In his judgment of homologation, the judge below blended the two estates, and proceeded, as he expresses it, "to regulate the final balances due to each of the heirs of both estates, after compensating the balances in favor of any of the heirs of either estate, by the amount found due from such heir, as debtor to the other estate;" he accordingly decreed the plaintiff to pay to the other heirs, eleven hundred and forty-two dollars and thirty-nine cents; being the difference between the amount due to him, from his father's estate, and that due by him to the succession of Marguerite Miller, his mother. It is to arrest the execution of this judgment, that plaintiff has taken out this injunction.

To render a partition valid and binding, all the parties to it, must be cited or notified; and all the formalities prescribed by law must be pursued to authorize a judgment of homologation and make it binding.

The plaintiff urges in support of his action:

1. That the judgment obtained by defendants is not binding on him, because he was never legally made a party to it; and that none of the formalities required by law, to render the partition legal and final, have been observed.

Before plaintiffs can issue a *fieri facias*, they must first notify their judgment to the defendant.

2. That the funds accruing to him from the estate of his father, after his failure, could not be applied to pay his debt to his mother's estate, from which he had been duly discharged.

It is clear, that the plaintiff has never been regularly made a party to the proceedings had in the estate of Marguerite Miller, his mother; his power of Attorney to Isaac L. Baker, authorized the latter to represent him only in the settlement of the succession of Pierre Guidry, Sen. As to his rights in the estate of his mother, which had accrued before the filing of his bilan, the plaintiff could not stand in judgment to prosecute or defend them. They had passed to his creditors, who alone could assert them, contradictorily with the other heirs. But, even admitting that Baker could have legally represented the plaintiff, in the partition of his mother's estate, as contended for by defendants, his powers were at an end in

1830, when he died; and from all the proceedings had subsequently, before the notary who made the partition, it does not appear that the plaintiff ever received the written notice required by *article* 1269 of the *Louisiana Code*, to enable him to attend at the partition; no process verbal seems to have been drawn up, showing that any of the heirs were present; nor does it appear that the plaintiff was summoned, according to *article* 1296, to show cause why the partition should not be approved. The compliance with all these formalities alone, could have rendered the partition final, and authorized a judgment of homologation; *Louisiana Code, art.* 1299. But, independent of all this, we do not find that the defendants had entitled themselves to a *fieri facias*, by having their judgment served on the plaintiff. This view of the subject, precludes the necessity of examining the other points in discussion.

So, where a judgment of partition, decreeing a balance due by an heir to his co-heirs, has not been regularly notified to him; and he was not made a party to the proceedings had in making the partition, he will be entitled to a perpetual injunction against such judgment.

It is, therefore, ordered, that the judgment of the court below be reversed and annulled, and that the injunction taken in the premises, be made perpetual; the defendants and appellees paying costs in both courts.